

PCA Case No. 2016-17

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC-  
CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT,  
SIGNED ON AUGUST 5, 2004 (the “DR-CAFTA”)**

**-and-**

**THE UNCITRAL ARBITRATION RULES (AS ADOPTED IN 2013)  
(the “UNCITRAL Rules”)**

**-between-**

**MICHAEL BALLANTINE AND LISA BALLANTINE**

**(the “Claimants”)**

**-and-**

**THE DOMINICAN REPUBLIC**

**(the “Respondent”, and together with the Claimants, the “Parties”)**

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**FINAL AWARD**

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*Tribunal:*

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)  
Ms. Marney L. Cheek  
Prof. Raúl Emilio Vinuesa

*Secretary to the Tribunal:*

Mr. Julian Bordaçahar

*Registry:*

**Permanent Court of Arbitration**

**3 September 2019**

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**GLOSSARY OF TERMS**

<b>Amended Statement of Claim</b>	The Claimants' Amended Statement of Claim, dated January 4, 2017
<b>Claimants</b>	Mr. Michael Ballantine and Ms. Lisa Ballantine
<b>Claimants' Costs Submission</b>	The Claimants' Submission on Costs, dated April 19, 2019
<b>Contracting Parties</b>	The Contracting Parties to DR-CAFTA
<b>DCF</b>	Discounted cash flow
<b>DR-CAFTA</b>	Dominican Republic-Central America-United States Free Trade Agreement, signed on August 5, 2004
<b>EC Report</b>	The environmental compliance report that must be submitted to the MMA every six months following the issuance of an environmental permit
<b>Enterprises</b>	Jamaca de Dios S.R.L. and Aroma de la Montaña, E.I.R.L.
<b>Environmental Impact Statement</b>	The environmental impact statement to be submitted to the MMA when requesting an environmental permit
<b>Environmental Law</b>	General Law on the Environment and Natural Resources (Law No. 64-00) of the Dominican Republic
<b>FET</b>	Fair and equitable treatment
<b>Hearing</b>	Hearing on jurisdiction, admissibility and merits conducted from September 3 to September 7, 2018, in Washington, D.C., United States of America
<b>ICJ</b>	International Court of Justice
<b>ILC</b>	International Law Commission
<b>Management Plan</b>	The Baiguate National Park's management plan
<b>MFN</b>	Most favorable nation
<b>MMA</b>	Ministry of the Environment and Natural Resources of the Dominican Republic
<b>MST</b>	Minimum standard of treatment
<b>NAFTA</b>	North American Free Trade Agreement, signed on December 17, 1992
<b>National Park</b>	The Baiguate National Park created by the National Park Decree

<b>National Park Decree</b>	Presidential Decree No. 571-09, published on August 7, 2009
<b>Notice of Arbitration</b>	The Claimants' Notice of Arbitration and Statement of Claim, dated September 11, 2014
<b>Notice of Intent</b>	The Claimants' Notice of Intent to Submit a Claim to Arbitration, dated June 12, 2014
<b>Objection to Admissibility</b>	The Respondent's Objection to Admissibility, dated November 8, 2017
<b>Parties</b>	The Claimants and the Respondent
<b>PCA</b>	Permanent Court of Arbitration
<b>Phase 1</b>	Phase 1 of Jamaca de Dios, comprising the development of the lower portion of the project, as defined by the Claimants
<b>Phase 2</b>	Phase 2 of Jamaca de Dios, comprising the development of the upper portion of the project, as defined by the Claimants
<b>Project(s)</b>	Each of the projects within the Jamaca de Dios development, as defined by the Respondent
<b>Rejoinder on Jurisdiction and Admissibility</b>	The Claimants' Rejoinder on Jurisdiction and Admissibility, dated May 21, 2018
<b>Rejoinder on Jurisdiction and Merits</b>	The Respondent's Rejoinder on Jurisdiction and Merits, dated March 19, 2018
<b>Reply Memorial</b>	The Claimants' Reply Memorial, dated November 9, 2017
<b>Reply on Bifurcation</b>	The Respondent's Reply on Bifurcation, dated March 8, 2017
<b>Reply to the Notice of Arbitration</b>	The Respondent's Reply to the Notice of Arbitration, dated October 13, 2014
<b>Request for Bifurcation</b>	The Respondent's Notice of Intended Preliminary Objection and Request for Bifurcation, dated February 17, 2017
<b>Respondent</b>	The Dominican Republic
<b>Respondent's Costs Submission</b>	The Respondent's Submission on Costs, dated April 19, 2019
<b>Respondent's Amended Costs Submission</b>	The Respondent's Amended Submission on Costs, dated May 15, 2019
<b>Response to the Objection to Admissibility</b>	The Claimants' Response to the Objection to Admissibility, dated November 17, 2017
<b>Response to the Request for Bifurcation</b>	The Claimants' Response to the Notice of Intended Preliminary Objection and Request for Bifurcation, dated March 6, 2017



<b>SENPA</b>	The Dominican Republic's National Service for Environmental Protection
<b>Statement of Defense</b>	The Respondent's Statement of Defense, dated May 25, 2017
<b>Submission of Costa Rica</b>	Non-Disputing Party Submission by Costa Rica, dated July 6, 2018
<b>Submission of the United States</b>	Non-Disputing Party Submission by the United States of America, dated July 6, 2018
<b>Surreply on Bifurcation</b>	The Claimants' Surreply of Bifurcation, dated March 10, 2017
<b>Technical Evaluation Committee</b>	The technical evaluation committee belonging to the MMA in charge of reviewing Environmental Impact Statements
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 2013
<b>VCLT</b>	Vienna Convention on the Law of Treaties, signed on May 23, 1969

## I. INTRODUCTION

### A. PARTIES TO THE ARBITRATION

1. The Claimants in these arbitration proceedings are Mr. Michael Ballantine and Ms. Lisa Ballantine (the “**Claimants**” or the “**Ballantines**”), two U.S. citizens whose stated domicile is at 951 Grissom Trail, Elk Grove Village, Illinois, 60007, United States of America. The Claimants own and control Jamaca de Dios S.R.L. and Aroma de la Montaña, E.I.R.L., two enterprises organized under the laws of the Dominican Republic (the “**Enterprises**”). In the present proceedings, the Claimants are represented by:

Mr. Matthew G. Allison  
**Baker & McKenzie LLP**  
300 East Randolph Street  
Chicago, IL, 60601  
United States of America

Mr. Teddy Baldwin  
**Baker & McKenzie LLP**  
815 Connecticut Avenue, N. W.  
Washington, DC, 20006  
United States of America

2. The Respondent in these arbitration proceedings is the Dominican Republic (the “**Respondent**”, and together with the Claimants, the “**Parties**”). The Respondent is represented in these proceedings by:

Ms. Yahaira Sosa  
(Vice-Minister of Foreign Commerce)  
Mr. Marcelo Salazar  
(Director of Foreign Commerce)  
Ms. Leidylin Contreras  
(Deputy Director of Foreign Commerce)  
Ms. Raquel de la Rosa  
(Legal Analyst, Investment Dispute Prevention and Resolution)  
Lic. Maria Amalia Lorenzo  
(Legal Analyst, Investment Dispute Prevention and Resolution)  
**Ministry of Industry and Commerce**  
Av. 27 de febrero No. 209,  
Ensanche Naco,  
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Dominican Republic

Ms. Patricia Abreu  
(Vice-Minister of Cooperation and Foreign Affairs)  
Ms. Rosa Otero  
(Director of Commerce and Environment)  
Ms. Claudia Adames  
(Attorney of Trade and Environment)  
Ms. Johanna Montero  
(Attorney of Trade and Environment)  
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Av. Cayetano Germosén, Esq. Gregorio Luperón,  
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Dominican Republic

Mr. Flavio Darío Espinal  
(Counsel to the President)

Mr. Paolo Di Rosa  
Mr. Raúl R. Herrera  
Ms. Mallory Silberman  
Ms. Claudia Taveras  
Ms. Cristina Arizmendi  
**Arnold & Porter Kaye Scholer LLP**  
555 Twelfth Street N.W.  
Washington, D.C. 20004  
United States of America

**B. OVERVIEW OF THE DISPUTE**

3. From 2005 onwards, the Claimants began developing Jamaca de Dios, a luxury residential housing project located in Jarabacoa, Dominican Republic. The present dispute arose after the Claimants encountered certain difficulties when carrying out their activities in Jamaca de Dios. In particular, the Claimants allege that certain environmental regulations established by the Respondent, and its corresponding enforcement, violated the Claimants' rights under DR-CAFTA.

## II. PROCEDURAL HISTORY

### A. INITIATION OF THE DISPUTE

4. On June 12, 2014, the Claimants notified the Respondent of their intent to submit a claim to arbitration (the “**Notice of Intent**”), in accordance with Article 10.16.1(b) of the Dominican Republic-Central America-United States Free Trade Agreement (the “**DR-CAFTA**”), signed on August 5, 2004 and entered into force on March 1, 2007 between its Contracting Parties (the “**Contracting Parties**”).
5. On September 11, 2014, the Claimants submitted, on their own behalf and on behalf of their Enterprises, their Notice of Arbitration and Statement of Claim (the “**Notice of Arbitration**”), pursuant to Articles 3 and 20 of the Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”), as adopted in 2013, and Articles 10.16.1(a), 10.16.1(b), and 10.16.3(c) of the DR-CAFTA.

### B. CONSTITUTION OF THE ARBITRAL TRIBUNAL

6. On September 11, 2014, on the occasion of serving on the Respondent the Notice of Arbitration, the Claimants appointed Mr. Henry Burnett, a national of the United States, as the first arbitrator.
7. By letter dated October 8, 2014, the Claimants informed that Mr. Henry Burnett had withdrawn his acceptance to act as arbitrator. In replacement, the Claimants appointed Ms. Marney Cheek, a national of the United States, as the first arbitrator.
8. On January 25, 2016, the Respondent appointed Prof. Raúl Vinuesa, a national of Argentina and Spain, as the second arbitrator.
9. On May 27, 2016, the Secretary-General of ICSID informed the Parties that pursuant to the Parties’ Joint Protocol for ICSID Appointment, Mr. Ricardo Ramírez Hernández, a national of Mexico, had been appointed as Presiding Arbitrator.
10. By letter dated June 3, 2016, Mr. Ricardo Ramírez accepted his appointment as Presiding Arbitrator. On the same day, the Arbitral Tribunal was fully constituted.
11. On August 10, 2016, the Parties and the Tribunal signed a document entitled **Terms of Appointment**. Among other things, the Parties confirmed that all members of the Tribunal had been validly appointed in accordance with the Treaty and the UNCITRAL Rules. Additionally, each member of the Tribunal confirmed that they were and shall remain impartial and independent of the Parties and that they had disclosed, to the best of their knowledge, all current circumstances

likely to give rise to justifiable doubts as to their independence and impartiality, and that they would disclose without delay any such circumstance that may arise in the future.

### C. THE ARBITRATION AGREEMENT

12. This Arbitration has been initiated pursuant to Articles 10.15 and 10.16 of DR-CAFTA:

#### Article 10.16: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
  - (i) that the respondent has breached
    - (A) an obligation under Section A,  
[...]
  - and
  - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
  - (i) that the respondent has breached
    - (A) an obligation under Section A,  
[...]
  - and
  - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- [...]
- (c) under the UNCITRAL Arbitration Rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (“notice of arbitration”):

- [...]
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent.

A claim asserted for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:
  - (a) the name of the arbitrator that the claimant appoints; or
  - (b) the claimant's written consent for the Secretary-General to appoint such arbitrator.

Article 10.17: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:
  - [...]
  - (b) Article II of the New York Convention for an "agreement in writing;" and
  - (c) Article I of the Inter-American Convention for an "agreement."

**D. LANGUAGE AND PLACE OF ARBITRATION**

13. Pursuant to Procedural Order No. 1, the languages of the arbitration are English and Spanish. In cases of differences of interpretation between the English and Spanish versions of the Tribunal's awards, decisions and procedural orders, the English text shall prevail.<sup>1</sup>
14. By agreement of the Parties, and as reflected in Procedural Order No. 1, the place of arbitration is Washington, D.C., United States of America.<sup>2</sup>

**E. REGISTRY**

15. On June 16, 2016, the Parties agreed on the Permanent Court of Arbitration (the "PCA") as the registry and as administering institution. They also agreed that, in consultation with the Tribunal, the Secretary-General of the PCA would designate a legal officer of the PCA's International Bureau to act as Secretary to the Tribunal.

**F. TRANSPARENCY OF THE PROCEEDINGS**

16. In accordance with Article 10.21 of DR-CAFTA, section 10 of Procedural Order No. 1 provides that:

10. Transparency

10.1 The arbitration shall be conducted in accordance with the procedure set forth in Article 10.21 of the CAFTA-DR. The PCA shall make available to the public, on its website, the information and documents listed in Article 10.21(1) of the CAFTA-DR, unless the Tribunal decides otherwise in accordance with the provisions of that Article.

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<sup>1</sup> Procedural Order No. 1, ¶¶ 3.1, 3.2.

<sup>2</sup> Procedural Order No. 1, ¶ 2.1.

10.2 Pursuant to Article 10.21(2) of the CAFTA-DR, hearings shall be conducted open to the public and the PCA shall determine, in consultation with the Parties and the Tribunal, the appropriate logistical arrangements. If any of the Parties intends to use information designated as protected information in a hearing, it shall so advise the Tribunal, who shall make appropriate arrangements to protect the information from disclosure.

**G. DEVELOPMENT OF THE PROCEEDINGS**

17. On July 11, 2016, the Tribunal circulated to the Parties for comments the drafts of the Terms of Appointment and the Procedural Order No. 1.
18. On August 10, 2016, the Parties and the Tribunal executed the **Terms of Appointment**.
19. On October 13, 2014, the Respondent submitted its Reply to the Notice of Arbitration (the “**Reply to the Notice of Arbitration**”).
20. On September 28, 2016, the Parties and the Tribunal held the first procedural meeting through a conference call, to discuss certain procedural issues.
21. By letter dated October 5, 2016, the Claimants requested the Tribunal that they be given an opportunity to present – should the Respondent raise any jurisdictional objections – a rejoinder on those jurisdictional issues – once the Parties had submitted two memorials each.
22. By letter dated October 12, 2016, the Respondent requested the Tribunal that the Claimants not be granted the request detailed in their letter dated October 5, 2016.
23. On October 21, 2016, the Tribunal issued **Procedural Order No. 1**, which, *inter alia*, addressed the points raised by the Claimants’ letter dated October 5, 2016, and the Respondent’s letter dated October 12, 2016.
24. On January 9, 2017, the Claimants submitted their Amended Statement of Claim, dated January 4, 2018 (the “**Amended Statement of Claim**”). On February 3, 2017, the Claimants submitted a Spanish version thereof.
25. On February 18, 2017, the Respondent submitted its Notice of Intended Preliminary Objection and Request for Bifurcation, dated February 17, 2017 (the “**Request for Bifurcation**”). A Spanish version thereof was submitted on March 6, 2017.
26. On March 7, 2017, the Claimants submitted their Response to the Notice of Intended Preliminary Objection and Request for Bifurcation, dated March 6, 2017 (the “**Response to the Request for Bifurcation**”). The Spanish version thereof was submitted on March 22, 2017.
27. On March 8, 2017, the Respondent submitted its Reply to the Claimants’ Response to the Request for Bifurcation (the “**Reply on Bifurcation**”). The Spanish version thereof was submitted on March 23, 2017.

28. On March 10, 2017, the Claimants submitted their Surreply to the Respondent's Reply on Bifurcation (the "**Surreply on Bifurcation**"). The Spanish version thereof was submitted on March 22, 2017.
29. On March 29, 2017, the Tribunal informed the Parties that the bifurcation request had been denied but a reasoned decision would be issued later.
30. On April 21, 2017, the Tribunal issued **Procedural Order No 2**, whereby the majority of the Tribunal rejected the bifurcation request and decided to hear the jurisdictional objection together with the merits of the Claimants' claim.
31. On May 26, 2017, the Respondent submitted its Statement of Defense and Objections to Jurisdiction, dated May 25, 2017 (the "**Statement of Defense**"). The Spanish version thereof was submitted on June 10, 2017.
32. On July 3, 2017, the Respondent submitted the Respondent's Application for an Order on Production of Documents to the Claimants, attaching the Redfern Schedule of the Respondent.
33. On July 4, 2017, the Claimants submitted their Document Production Requests in the form of a Redfern Schedule.
34. On July 17, 2017, the Tribunal issued **Procedural Order No. 5**, deciding on the Parties' requests for document production.
35. On November 9, 2017, the Respondent submitted its Objection to Admissibility, dated November 8, 2017 (the "**Objection to Admissibility**"), a submission which was not contemplated within the procedural calendar, but which the Respondent justified on the basis of new evidence resulting from the Document Production Phase of the Arbitration. The Spanish version thereof was submitted on December 1, 2017.
36. On the same day, the Claimants requested leave from the Tribunal to file a reply to the Respondent's Objection to Admissibility, which was granted by the Tribunal.
37. Later on the same day, the Claimants submitted their Reply to the Respondent's Statement of Defense (the "**Reply Memorial**"). The Spanish version thereof was submitted on December 5, 2017.
38. On November 18, 2017, the Claimants submitted their Response to the Respondent's Admissibility Objection, dated November 17, 2017 (the "**Response to the Objection to Admissibility**"). The Spanish version thereof was submitted on December 5, 2017.
39. On December 22, 2017, the Tribunal issued **Procedural Order No. 7**, deciding to postpone the decision on both the admissibility and merits of the Respondent's Objection to Admissibility until a later stage of the proceedings. The Respondent was invited to answer to the Claimants' Response



in its Rejoinder, and in turn, the Claimants were invited to submit their surreply in their Rejoinder on Jurisdiction.

40. As a result of certain issues that arose between the Parties in December 2017 when the Respondent intended to visit Jamaca de Dios, several exchanges of correspondence ensued between the Parties and the Tribunal. Consequently, **Procedural Orders Nos. 8, 9, 10 and 13** were issued by the Tribunal on March 4, April 20, May 14, and August 30, 2018, respectively.<sup>3</sup>
41. On March 20, 2018, the Respondent submitted its Rejoinder on Jurisdiction and Merits, dated March 19, 2018 (the “**Rejoinder on Jurisdiction and Merits**”). The Spanish version thereof was submitted on April 7, 2018.
42. On May 22, 2018, the Claimants submitted their Rejoinder on Jurisdiction and Admissibility dated May 21, 2018 (the “**Rejoinder on Jurisdiction and Admissibility**”). The Spanish version thereof was submitted on August 27, 2018,
43. By e-mail dated July 6, 2018, the Republic of Costa Rica filed its non-disputing party submission (“**Submission of Costa Rica**”).
44. By e-mail dated July 7, 2018, the United States filed its non-disputing party submission, dated July 6, 2018 (“**Submission of the United States**”).
45. On August 24, 2018, the Tribunal issued **Procedural Order No. 12**, establishing the details regarding the hearing to be held in Washington, D.C., United States of America, between September 3 and September 7, 2018 (the “**Hearing**”).

## **H. THE HEARING**

46. From September 3 to September 7, 2018, the Parties and the Tribunal held the Hearing, in the World Bank facilities in Washington, D.C., United States of America. In accordance with the transparency provisions under DR-CAFTA, the Hearing was broadcasted live, and the Hearing transcripts were later published in the PCA’s website, along with all the Parties’ submissions and the Tribunal’s Procedural Orders.<sup>4</sup>

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<sup>3</sup> A full account of those procedural events need not be reproduced in full here. However, the Procedural Orders themselves do contain a detailed account of the procedural and factual history, the Parties’ positions and arguments, and the Tribunal’s reasoning and decisions.

<sup>4</sup> See <https://pca-cpa.org/en/cases/143/>

47. The following persons were present at the Hearing:

**Arbitral Tribunal**

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)

Ms. Marney L. Cheek

Prof. Raúl Emilio Vinuesa

**Claimants**

Mr. Michael Ballantine

Ms. Lisa Ballantine

Mr. Edward “Teddy” Baldwin, Baker & McKenzie LLP

Mr. Matthew Allison, Baker & McKenzie LLP

Ms. Larissa Diaz, Baker & McKenzie LLP

Ms. Shaila Urmi, Baker & McKenzie LLP

Mr. Eric Kay, Kay Associates

Mr. James Farrell, Berkeley Research Group

Ms. Drew Lehmann, Berkeley Research Group

Mr. Graviel Peña

Ms. Leslie Gil Peña

Ms. Jayne Baldwin

**Respondent**

Mr. Marcelo Salazar, Ministry of Industry and Commerce  
Ms. Leidylin Contreras, Ministry of Industry and Commerce  
Ms. Raquel De La Rosa, Ministry of Industry and Commerce  
Ms. Patricia Abreu, Ministry of Environment and Natural Resources  
Mr. Enmanuel Rosario, Ministry of Environment and Natural Resources  
Ms. Rosa Otero, Ministry of Environment and Natural Resources  
Ms. Johanna Montero, Ministry of Environment and Natural Resources  
Ms. Claudia Adames, Ministry of Environment and Natural Resources  
Mr. Paolo Di Rosa, Arnold & Porter  
Mr. Raúl Herrera, Arnold & Porter  
Ms. Mallory Silberman, Arnold & Porter  
Ms. Claudia Taveras, Arnold & Porter  
Ms. Cristina Arizmendi, Arnold & Porter  
Mr. Kelby Ballena, Arnold & Porter  
Ms. Claudia Boscan, Arnold & Porter  
Ms. Kaila Millett, Arnold & Porter  
Mr. Jose Antonio Rivas  
Mr. Zacarías Navarro  
Prof. Eleuterio Martinez  
Mr. Jose Roberto Hernández  
Mr. Peter W. Deming, Mueser Rutledge Consulting Engineers (MRCE)  
Mr. Pieter N. Booth, Ramboll  
Mr. Timothy H. Hart, Credibility International  
Ms. Laura Connor Smith, Credibility International  
Ms. Tyler Smith Khoury, Credibility International

**Registry: Permanent Court of Arbitration**

Mr. Julián Bordaçahar, PCA Legal Counsel and Secretary to the Tribunal

**Interpreters**

Ms. Silva Colla  
Mr. Daniel Giglio

**Court Reporters**

Ms. Margie Dauster, Dauster|Murphy  
Mr. Virgilio Dante Rinaldi, D-R Esteno  
Mr. Dionisio Rinaldi, D-R Esteno

48. The following witnesses and experts were examined at the Hearing:

**Witnesses**

Mr. Michael Ballantine  
Mr. Zacarías Navarro  
Mr. Jaime David Fernández Mirabal<sup>5</sup>  
Prof. Eleuterio Martínez  
Mr. José Roberto Hernández

**Experts**

Mr. Graviel Peña  
Mr. Eric Kay, Kay Associates  
Mr. James Farrell, Berkeley Research Group  
Mr. Timothy H. Hart, Credibility International  
Mr. Peter W. Deming, Mueser Rutledge Consulting Engineers (MRCE)  
Mr. Pieter N. Booth, Ramboll

49. During the Hearing, information emerged regarding the funding of the Claimants' legal costs by a third party.<sup>6</sup> The Tribunal then heard the Parties' submissions on the relevance and consequences arising from the fact that the Claimants' claims were being funded by a third party. After reflecting on the Parties' positions, the Tribunal ordered the Claimants to disclose only to the Tribunal and the PCA the agreement that the Claimants had concluded with the third-party funder.
50. After reviewing the agreement, and at the Respondent's request, the Tribunal ordered the Claimants to disclose to the Respondent the identity of the third-party funder, and the date of the agreement, to discard any conflicts of interest. On October 2, 2018, the Tribunal issued **Procedural Order No. 16** to address the issue of the third-party funder. Among other things, the Tribunal informed the Parties that, to the best of its knowledge, the third-party's involvement in the arbitration did not raise conflicts of interest for any of the Tribunal's members.
51. At the end of the Hearing, the Tribunal asked the Parties several questions, which were replied orally by the Parties' counsel. Additionally, the Tribunal made the Parties aware that the submission of post-hearing briefs would not be expected.

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<sup>5</sup> By videoconference from Santo Domingo, Dominican Republic.

<sup>6</sup> Hearing Transcript, Day 2, 501:7-502:23 (English).

**I. POST-HEARING DEVELOPMENTS**

52. On April 19, 2019, the Parties filed their respective submissions on costs (the “**Claimants’ Costs Submission**” and the “**Respondent’s Costs Submission**”).
53. On May 15, 2019, the Respondent amended its Costs Submission, reflecting newly acquired information (the “**Respondent’s Amended Costs Submission**”).
54. On July 17, 2019, after having duly consulted the Parties, the Tribunal declared the closure of hearings pursuant to Article 31(1) of the UNCITRAL Rules.

### III. FACTUAL BACKGROUND

#### A. INTRODUCTION

55. In 2000, Michael Ballantine, Lisa Ballantine and their children travelled to the Dominican Republic to work as Christian missionaries and to undertake humanitarian work, including the distribution of water filters through a non-profit entity created by Lisa Ballantine.<sup>7</sup> While they returned to Chicago in 2001, they continued their work in the Dominican Republic, “*visiting the country each year to further support the communities they had begun to serve*”.<sup>8</sup>
56. In the early 2000s, the Claimants noticed that in the mountains around Jarabacoa there was no successful luxury real estate development with shared infrastructure and amenities, even though they considered it an ideal place for such a project.<sup>9</sup>
57. Thus, the Claimants began purchasing mountain property in the area of Palo Blanco in Jarabacoa. The Claimants distinguish two phases in the development of Jamaca de Dios,<sup>10</sup> phase 1 – which focused on the lower portion of the property and was commenced in 2005<sup>11</sup> – (“**Phase 1**”), and phase 2 – which was intended to expand the project towards the upper part of the mountain and was commenced in 2009 (“**Phase 2**”).<sup>12</sup>
58. In 2003, the Claimants bought their first tract, 218,552 square meters, from Francisco Sanchís. Between 2004 and 2008, they bought additional land rights, primarily from the family of Carlos Manuel Duran. By 2009, all of the land in Phase 1 of Jamaca de Dios was titled to the Claimants’ name, as well as, 140,835 square meters of Phase 2. By September 2010, the Claimants owned 194,500 of the 283,000 square meters of Phase 2.<sup>13</sup> On January 7, 2011, 45,036.40 square meters were purchased from Ramón Amable Rodríguez.<sup>14</sup> On January 14, 2011, 9,905.78 square meters

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<sup>7</sup> Notice of Arbitration, ¶ 2; Amended Statement of Claim, ¶¶ 18-19; First Witness Statement of Lisa Ballantine.

<sup>8</sup> Amended Statement of Claim, ¶ 20.

<sup>9</sup> Amended Statement of Claim, ¶ 21; First Witness Statement of Michael Ballantine, ¶¶ 7-10.

<sup>10</sup> Amended Statement of Claim, ¶¶ 24-25.

<sup>11</sup> Amended Statement of Claim, ¶ 39.

<sup>12</sup> Amended Statement of Claim, ¶ 64.

<sup>13</sup> Reply Memorial, ¶ 99(m). As the Claimants explain, after a series of transactions between 2004 and 2008, on May 12, 2010, the Claimants received an official Dominican land title for 147,005.78 square meters of their Phase 2 land, **Exhibit C-105**. Additionally, the Claimants had acquired 22,255.04 square meters from Federico Abreu, on June 25, 2007, **Exhibit C-106**; and 31,350 square meters from Wilson Duran on September 15, 2009, **Exhibit C-107**.

<sup>14</sup> Reply Memorial, footnote 110; Promissory land purchase deed in favor of Jamaca de Dios Jarabacoa S.R.L. for 45,000 square meters (January 7, 2011), **Exhibit C-108**.

were acquired from María Consuelo Rodríguez.<sup>15</sup> On February 9, 2011, 15,130 square meters were bought from Miguel Serrata Rodríguez.<sup>16</sup> Lastly, on March 29, 2011, 18,582.99 square meters were purchased from Ana Lidia Rodríguez Serrata.<sup>17</sup> Until the initial denial of their expansion request in 2011 they continued to acquire lands for Phase 2.<sup>18</sup>

59. The Claimants hold that it was their plan to create a community

where private individuals could purchase land and build luxury mountain homes, and where domestic and international tourists could stay in a boutique spa hotel high on the mountain, while enjoying recreational and other activities, such as hiking trails, organic gardens, parks and common areas. The Ballantines intended that homeowners and local citizens could also enjoy first-class dining with striking views of the valley.<sup>19</sup>

60. Jamaca de Dios was intended to have at least two development phases. In Phase 1, the lower portion of the property would be developed to create the infrastructure necessary to develop the entire mountain and more than 90 individual parcels would be sold to private buyers to build luxury homes and a restaurant, which would be “*a focal point of the complex*”.<sup>20</sup>

61. In Phase 2, the Project would be expanded by extending the road further up the mountain and by subdividing the upper portion of the property.<sup>21</sup> The Claimants also planned for the construction of a luxury hotel and spa with a second restaurant, mountain-lodge style apartments, and a larger apartment complex closer to the base of the property.<sup>22</sup>

62. By the summer of 2009, after Phase 1 was approved and more than 90 individual luxury parcels were subdivided, the Claimants owned “*more than 162,000 square meters of titled property further up the mountain*” and were in the process of acquiring an additional 220,000 square meters for further development.<sup>23</sup>

63. The Baiguate National Park was created by Presidential Decree No. 571-09, published on August 7, 2009 (the “**National Park Decree**”), to protect the *Salto Baiguate* or Baiguate waterfall, the endangered walnut trees and the forests along the river (the “**National Park**”). By the time the

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<sup>15</sup> Reply Memorial, footnote 110; Land purchase deed in favor of Jamaca de Dios Jarabacoa S.R.L. for 9,900 square meters (January 14, 2011), **Exhibit C-109**.

<sup>16</sup> Reply Memorial, footnote 110; Land purchase deed in favor of Jamaca de Dios Jarabacoa S.R.L. for 15,000 square meters (February 9, 2011), **Exhibit C-110**.

<sup>17</sup> Reply Memorial, footnote 110; Land purchase deed in favor of Jamaca de Dios Jarabacoa S.R.L. for 18,500 square meters (March 29, 2011), **Exhibit C-111**.

<sup>18</sup> Amended Statement of Claim, ¶ 22; Report JDD Property All Purchases, **Exhibit C-31**.

<sup>19</sup> Amended Statement of Claim, ¶ 23.

<sup>20</sup> Amended Statement of Claim, ¶ 24; First Witness Statement of Michael Ballantine, ¶ 19.

<sup>21</sup> Amended Statement of Claim, ¶ 25.

<sup>22</sup> Amended Statement of Claim, ¶ 25; Reply Memorial, ¶ 95.

<sup>23</sup> Amended Statement of Claim, ¶ 26.

National Park Decree was published, less than half of the land associated with Phase 2 had been purchased by the Claimants.<sup>24</sup>

64. The enactment of the National Park Decree was the culmination of a nation-wide environmental protection initiative which began in October 2004.<sup>25</sup> From August 2008 to August 2009, Prof. Eleuterio Martínez led a team of government officials, scientists and cartographers in identifying new areas for environmental protection, by relying on existing information and comparing it with information obtained from field visits, to see whether the area should be recommended for protection to a high-level advisory panel. The National Park Decree established 32 new protected areas, including the National Park.<sup>26</sup>
65. The Respondent explains that the area where the National Park is located was important for two reasons. First, because it has a sensitive and highly-fragile flora and fauna biodiversity. Second, *“for the preservation of ecosystemic services, especially in relation to the production and protection of water in order to avoid potential landslides, given the intense annual dry and rainy seasons”*.<sup>27</sup> Additionally, the Baiguata waterfall was also protected for being a bathing site and holding special rituals, known to the native Taino culture. For the same reasons, the river source and tributaries were included within the National Park’s boundaries. According to Prof. Martínez, protecting the river source and tributaries would not only protect the Baiguata waterfall but also the biodiversity in the neighboring Mogote mountain system.<sup>28</sup> During that time, the team did not consider who owned the land or what they intended to do with it.<sup>29</sup>
66. In addition, the Respondent does not agree with the distinction proposed by the Claimants, since the Phase 1/Phase 2 dichotomy both confounds and oversimplifies the issues at stake.<sup>30</sup> According to the Respondent, the Phase 1/Phase 2 contrast is sometimes used by the Claimants to make a geographic distinction, while at other times it is used to make a temporal one.<sup>31</sup> Thus, the Respondent rejects the Claimants’ proposed nomenclature, and instead identifies five projects

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<sup>24</sup> Statement of Defense, ¶ 105; Rejoinder on Jurisdiction and Merits, ¶ 140; Claimants’ Table of Jamaca de Dios Land Purchases (undated), § III, **Exhibit C-31**.

<sup>25</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 141-142; Witness Statement of Eleuterio Martínez, ¶¶ 24-29.

<sup>26</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 144-145; Witness Statement of Eleuterio Martínez, ¶¶ 33-36; Decree No. 571-09, (August 7, 2009) (as published in the Official Gazette No. 10535 dated September 7, 2009), **Exhibit R-77**.

<sup>27</sup> Witness Statement of Eleuterio Martínez, ¶ 42.

<sup>28</sup> Decree No. 571-09, Art. 14, **Exhibit R-77**; Witness Statement of Eleuterio Martínez, ¶¶ 50-51.

<sup>29</sup> Witness Statement of Eleuterio Martínez, ¶¶ 33-46.

<sup>30</sup> Statement of Defense, ¶ 71.

<sup>31</sup> Statement of Defense, ¶¶ 72-74.



(each, a “**Project**”), distinguishable according to where the Projects are located and at what time they were pursued.<sup>32</sup>

67. According to the Respondent, Project 1 was supposedly a reforestation project, for which permission was sought on December 28, 2004, to build an access road.<sup>33</sup> Project 2 was the construction of the restaurant Aroma de la Montaña, a housing development on the lower portion of Jamaca de Dios.<sup>34</sup> Project 3 included plans to extend Project 1’s road, expand Jamaca de Dios further up the mountain, sell at least 70 additional lots for luxury private homes, and the construction of a boutique hotel. However, when the Claimants sought permission from the Ministry of Environment and Natural Resources (the “**MMA**”) for the project, it was described as the construction of 10 cabins and 19 villas.<sup>35</sup> This is the project that the Claimants twice sought reconsideration for, and, as a result, they received three denials.<sup>36</sup> In the last of these denials, the MMA finally referred to the existence of the Baiguata National Park.<sup>37</sup> Project 4 is the mountain lodge that the Claimants sought to build above the restaurant Aroma de la Montaña.<sup>38</sup> Lastly, Project 5 refers to an apartment complex for which the Claimants never sought permission.<sup>39</sup>

**B. SEEKING APPROVAL FROM THE MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES FOR THE DEVELOPMENT OF PHASE 1**

68. The Claimants sought to acquire the approval from the MMA for the Project. However, before that, in October 2004, the Claimants signed an agreement with PROCARYN, a German non-profit, to plant 50,000 trees across the property to stabilize the environment and create a “*more enticing setting for the home sites they intended to create*”.<sup>40</sup> In this sense, the Claimants sought permission from the MMA’s Forestry Department to build a road to facilitate the reforestation plan. It was the Claimants’ opinion that the road was critical for the Project, and they attempted to build one never before done by a private enterprise in the Dominican Republic.<sup>41</sup>

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<sup>32</sup> Statement of Defense, ¶ 75.

<sup>33</sup> Statement of Defense, ¶ 77.

<sup>34</sup> Statement of Defense, ¶ 78.

<sup>35</sup> Statement of Defense, ¶ 79.

<sup>36</sup> Statement of Defense, ¶¶ 80-83.

<sup>37</sup> Statement of Defense, ¶ 83.

<sup>38</sup> Statement of Defense, ¶ 84.

<sup>39</sup> Statement of Defense, ¶ 85.

<sup>40</sup> Amended Statement of Claim, ¶ 28; First Witness Statement of Michael Ballantine, ¶ 13; Agreement with Procaryn, **Exhibit C-32**.

<sup>41</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 121-122; First Witness Statement of Michael Ballantine, ¶¶ 14-15.

69. On December 28, 2004, the Claimants wrote to the MMA seeking permission to build an access road for the reforestation plan.<sup>42</sup>
70. On January 18, 2005, the MMA granted permission to cut a road and plant the trees.<sup>43</sup> The MMA added that it had no objection as long as no trees were cut, removed and/or transplanted, nor any sand or gravel was extracted or transported.<sup>44</sup> The road was completely built within the Claimants' development to be a service entrance for Jamaca de Dios. The Claimants allowed the landowners to the west of Jamaca de Dios to use this road until 2011, as it was much safer and more convenient than the historic pathway, which did not allow the passage of vehicles.<sup>45</sup>
71. During the road construction, the Claimants spent significant sums of money on heavy equipment, fuel and earth moving, which involved finding "*large deposits of rock and road grade material in varying place[s] throughout the mountain*" and then using "[t]his material [...] for backfill, engineered support structures, road base, and drainage channels".<sup>46</sup> According to the Respondent, these kind of actions were in violation of the conditions set out in the permit.<sup>47</sup>
72. The Claimants sought the permit from the MMA in accordance with the procedure established in the *Ley General sobre Medio Ambiente y Recursos Naturales (Ley No. 64-00)* (the "**Environmental Law**"). To this effect, the Claimants hired Antilia Environmental Consultants, a Dominican environmental company, to assist them with the permit request.<sup>48</sup>
73. In short, the procedure to request an environmental permits is divided into six steps. First, the applicant must obtain a "no objection" letter from the municipal government where the proposed project is to be located. Second, this letter must be provided to the MMA, and the MMA would provide "terms of reference" for the submission of a *Declaración de Impacto Ambiental* (the "**Environmental Impact Statement**"). The Environmental Law does not contain a comprehensive list of all the factors that must be taken into account for the Environmental Impact Statement.<sup>49</sup> Third, to provide the terms of reference, the MMA must conduct a technical visit to the site of the proposed project. Fourth, the applicant must draft and submit the Environmental

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<sup>42</sup> Request to Build Reforestation Access Road (December 28, 2004), **Exhibit C-33**.

<sup>43</sup> Amended Statement of Claim, ¶ 29; Road Application (December 28, 2004), **Exhibit C-33**; First Witness Statement of Michael Ballantine, ¶ 14; Road Application (January 18, 2005), **Exhibit C-34**.

<sup>44</sup> Statement of Defense, ¶ 77; Rejoinder on Jurisdiction and Merits, ¶ 123; Ministry's Response to the Request to Build Reforestation Access Road (January 18, 2005), **Exhibit C-34**.

<sup>45</sup> Reply Memorial, ¶ 232; Second Witness Statement of Michael Ballantine, ¶¶ 11-13.

<sup>46</sup> First Witness Statement of Michael Ballantine, ¶ 16.

<sup>47</sup> Rejoinder on Jurisdiction and Merits, ¶ 124.

<sup>48</sup> Notice of Arbitration, ¶ 35; Amended Statement of Claim, ¶ 32; Rejoinder on Jurisdiction and Merits, ¶ 133; First Witness Statement of Michael Ballantine, ¶ 18.

<sup>49</sup> Rejoinder on Jurisdiction and Merits, ¶ 130; Environmental Law, Article 117, **Exhibit R-3**.

Impact Statement. Fifth, the MMA reviews the Environmental Impact Statement and prepares a technical report on the proposed project through its *Comité Técnico de Evaluación* (the “**Technical Evaluation Committee**”). Lastly, based on the technical report, the Environmental Impact Statement, and any stakeholder or public comments, the MMA issues a decision granting or denying the permit for the proposed project.<sup>50</sup>

74. Thus, the Claimants requested a “no objection” letter from the City Council of the Municipality of Jarabacoa. On February 7, 2005, the “no objection” letter was later provided to the MMA, and the Claimants requested the terms of reference for the Environmental Impact Statement.<sup>51</sup> The MMA conducted a technical visit to Jamaca de Dios and some MMA technicians observed, *inter alia*, the irregular topography of the land, with steep slopes increasing land erosion, and the fact that a road was under construction. The last issue was investigated and flagged for further review. The technicians recommended that the Environmental Impact Statement should focus on the topographic survey of the access road.<sup>52</sup>
75. On August 18, 2006, the MMA issued the terms of reference for the Claimants and invited them to submit the Environmental Impact Statement within a year.<sup>53</sup> The Claimants submitted the Environmental Impact Statement with the MMA in mid-February, 2007, for 82 home sites and a restaurant.<sup>54</sup> After being reviewed by the MMA, it was considered to be deficient, missing many important details. In June 2007, the MMA asked the Claimants to redo it, and for which Antilia Environmental Consultants committed to develop a more thorough study.<sup>55</sup>
76. In August 2007, the Claimants submitted a revised study. The Technical Evaluation Committee completed its technical report of the proposed Project. On December 7, 2007, the MMA issued the permit No. 0649-07 for the development of the lower portion of the Project. The permit included an obligation to submit an environmental compliance report every six months (each, an “**EC Report**”) and the assumption of liability for any penalties due to causing any environmental harm. The permit also stated that a new Environmental Impact Statement would

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<sup>50</sup> Amended Statement of Claim, ¶ 31. *See*, Rejoinder on Jurisdiction and Merits, ¶ 127.

<sup>51</sup> Letter from M. Ballantine to Zoila Gonzalez (February 7, 2005), **Exhibit C-35**.

<sup>52</sup> Rejoinder on Jurisdiction and Merits, ¶ 132; Prior Analysis Report (April 4, 2006), **Exhibit R-258**.

<sup>53</sup> Rejoinder on Jurisdiction and Merits, ¶ 133; Letter from MMA to Michael Ballantine (August 18, 2006), p. 2, **Exhibit C-36**.

<sup>54</sup> Rejoinder on Jurisdiction and Merits, ¶ 134; Amended Statement of Claim, ¶ 33; Letter from Michael Ballantine to Zoila González (February 7, 2005), **Exhibit C-35**; Letter from Zoila González to Michael Ballantine (August 18, 2006), **Exhibit C-36**; Letter from Michael Ballantine to Zoila González (February 14, 2007), **Exhibit C-37**.

<sup>55</sup> Rejoinder on Jurisdiction and Merits, ¶ 134; **Exhibit C-37**; Letter from MMA to Michael Ballantine (June 15, 2007), p. 1, **Exhibit R-64**.

be required for any substantial modification or addition, or for any construction site.<sup>56</sup> At the time, the Claimants were living in the United States and managing the process from there.<sup>57</sup>

77. During this process, the Claimants allege that the MMA did not indicate that the slope in the mountain of the Ballantine's property was an issue of concern, "*or that any portion of the land in Phase 1 could not be developed because it exceeded the slope limitations set forth*"<sup>58</sup> in the Environmental Law. The Claimants and the MMA had a "*constructive relationship*" during the establishment and initial development of Jamaca de Dios.<sup>59</sup>
78. After the approval of Phase 1, the MMA conducted annual inspections on Jamaca de Dios to ensure environmental compliance, reviewed the semi-annual reports submitted by Jamaca de Dios in accordance with Dominican law, and exchanged communications on several topics.<sup>60</sup>

#### C. THE CLAIMANTS' ALLEGED COMMERCIAL SUCCESS OF PHASE 1 OF THE PROJECT

79. The Claimants developed the infrastructure necessary to support Phase 1 and the future Phase 2: networks to supply electricity, high-speed Internet, and potable water throughout the property; they hired 24-hour security and maintenance; created recreational and other common areas.<sup>61</sup> The Claimants invested in designing and building a "*high-quality, environmentally sound road throughout the complex*".<sup>62</sup>
80. The Claimants explain that mountain roads are difficult to build and maintain. Since the Claimants understood the importance of a quality road for Jamaca de Dios, they invested time and money to create "*the finest private mountain road in the Dominican Republic*".<sup>63</sup> They cleared and fully surveyed the mountain, analyzing potential routes with physical and computer modelling. Their claimed intention was to build a road that would avoid significant steepness, while still gaining altitude and allowing "*exploitation of the flattest areas of the mountain for the development of premier home sites*".<sup>64</sup> The Claimants argue that they were "*well-situated to make a simple*

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<sup>56</sup> Reply to the Notice of Arbitration, ¶ 15; Rejoinder on Jurisdiction and Merits, ¶ 136; **Exhibit C-4**, pp. 6-7.

<sup>57</sup> Amended Statement of Claim, ¶ 34; Rejoinder on Jurisdiction and Merits, ¶ 135; Permiso Ambiental No. 0649-07 (December 7, 2007), **Exhibit C-4**.

<sup>58</sup> Amended Statement of Claim, ¶ 35.

<sup>59</sup> Amended Statement of Claim, ¶ 36. *See*, Notice of Arbitration, ¶ 4.

<sup>60</sup> Amended Statement of Claim, ¶ 36.

<sup>61</sup> Notice of Arbitration, ¶ 38; Amended Statement of Claim, ¶ 42.

<sup>62</sup> Amended Statement of Claim, ¶ 43.

<sup>63</sup> Amended Statement of Claim, ¶ 45.

<sup>64</sup> Amended Statement of Claim, ¶ 46; First Witness Statement of Michael Ballantine, ¶ 11.

*extension of the road into Phase 2*”.<sup>65</sup> They contend that much of the machinery necessary to build the road had been purchased and they also had in the mountain the raw material necessary for the road bed.<sup>66</sup>

81. According to the Claimants, despite the MMA’s refusal to allow the expansion based on the slopes, the slopes in Phase 2 are more gradual than in Phase 1, thus, “*the engineering necessary to duplicate the quality of the Phase 1 road would be less intensive*”.<sup>67</sup>
82. After having established the necessary infrastructure during Phase 1, the Claimants subdivided the property into individual lots and began selling them to private purchasers through a standard sales contract. The landowners had the right to construct their own homes, subject to certain limitations imposed by Jamaca de Dios. The private purchasers were required to start constructing within two years of purchase and to finish in the following two years.<sup>68</sup>
83. The Claimants also developed their restaurant, Aroma de la Montaña. Since its establishment in May 2007, the Claimants state that Aroma de la Montaña has increased in popularity as a dining destination for the residents of Jarabacoa and visitors from elsewhere.<sup>69</sup>
84. According to the Claimants, in less than five years, Jamaca de Dios became “*the most popular and prosperous mountain tourism and residential project in the Dominican Republic*”, selling 75 lots between 2007 and 2011. By the time of the Statement of Claim, all of the lots had been sold and “*the small remaining inventory consists of reacquisitions by Jamaca*”.<sup>70</sup> The Claimants hold that more than 300 people were directly or indirectly employed in Jamaca de Dios, making it the largest development company in Jarabacoa.<sup>71</sup>

#### **D. THE CLAIMANTS’ PLANS FOR PHASE 2 OF THE PROJECT**

85. In 2009, the Claimants commenced Phase 2 of their investment. Their intention was to sell at least 70 lots on the upper portion of Jamaca de Dios, which would have been more valuable than the properties in Phase 1 because of, *inter alia*, the views, the temperature, the enhanced privacy.

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<sup>65</sup> Amended Statement of Claim, ¶ 47; Expert Report of Eric L. Kay, ¶¶ 7, 12.

<sup>66</sup> Amended Statement of Claim, ¶ 48; First Witness Statement of Michael Ballantine, ¶ 16; Expert Report of Eric L. Kay, ¶ 12.

<sup>67</sup> Amended Statement of Claim, ¶ 48; Expert Report of Eric L. Kay, ¶ 12.

<sup>68</sup> Amended Statement of Claim, ¶ 49; First Witness Statement of Michael Ballantine, ¶ 22.

<sup>69</sup> Notice of Arbitration, ¶ 40; Amended Statement of Claim, ¶ 50; First Witness Statement of Michael Ballantine, ¶¶ 23-26.

<sup>70</sup> Amended Statement of Claim, ¶ 51; First Witness Statement of Michael Ballantine, ¶ 24.

<sup>71</sup> Amended Statement of Claim, ¶ 52.

Phase 2 would be accessed through an extension of the road that ended at the top of Phase 1. The Claimants also intended to build luxury homes in Phase 2.<sup>72</sup>

86. At the beginning of 2011, the Claimants conducted an expansion of Aroma de la Montaña, from 90 to 225 available seats. They also installed a rotating floor in the main dining room, something unique in the Caribbean. The Claimants allege that the expansion was undertaken solely because they anticipated an increasing number of owners and visitors which Phase 2 would attract.<sup>73</sup> The Respondent argues the expansion was in 2012 and that it was unauthorized, violating the terms of the Project 2 permit. The only license the Claimants had received for Aroma de la Montaña was a restaurant operating license, granted in May 2014 by the Ministry of Tourism. This license still obliged the Claimants to seek the other permits, licenses and authorizations.<sup>74</sup>
87. The Claimants claim that they also intended to construct a boutique hotel in Phase 2. They engaged an architect to design it and a Taino Indian expert to ensure the cultural appropriateness of the hotel design and decoration.<sup>75</sup> Additionally, they also planned to construct a mountain lodge at the top of Phase 1. ProHotel, one of the Claimants' consultants, undertook an analysis of the strengths, weaknesses, opportunities and threats of the project. Among the threats, they identified the disruption of the flora and fauna and to the environment. ProHotel recommended to first obtain financing and the permits for the mountain lodge. Only then would a marketing and sales plan be developed, a construction company be hired, and advertising be conducted.<sup>76</sup> Instead – the Respondent points out – the Claimants hired a Dominican architect to design the lodge, began a marketing campaign, and even took client deposits for units at the mountain lodge.<sup>77</sup>
88. The Claimants explain that they also planned to build an apartment building to host larger families, near the base of the complex. As a result, they had established a management company to oversee rental programs for these apartments.<sup>78</sup>

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<sup>72</sup> Amended Statement of Claim, ¶¶ 64-67; First Witness Statement of Michael Ballantine, ¶¶ 27-28.

<sup>73</sup> Amended Statement of Claim, ¶ 68; First Witness Statement of Michael Ballantine, ¶ 26. *See also*, Restaurant Expansion Report, **Exhibit C-48**.

<sup>74</sup> Rejoinder on Jurisdiction and Merits, ¶ 152; Email from L. Ballantine to Family (December 24, 2012), p. 5, **Exhibit R-243**. *See Exhibit C-4* and *see also*, Restaurant Operating License for Aroma de la Montaña (May 19, 2014), **Exhibit R-272**.

<sup>75</sup> Amended Statement of Claim, ¶ 69; First Witness Statement of Michael Ballantine, ¶ 37.

<sup>76</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 205-206; Jamaca de Dios Development Plan, ProHotel International Inc., pp. 8-10, **Exhibit R-257**.

<sup>77</sup> *See*, Mountain Lodge Transactions, **Exhibit R-260**.

<sup>78</sup> Amended Statement of Claim, ¶ 72; Witness Statement of Wesley Proch, ¶ 9; Design for Apartment Complex, **Exhibit C-51**; First Witness Statement of Michael Ballantine, ¶ 38.

**E. ISSUES WITH THE ROAD**

89. By 2011, at the end of the road the Claimants added gates for their property. Immediately after the gates' construction, the Claimants offered the Rodríguez family, the ones using the road built in 2005, to instead drive through the main Jamaca road.<sup>79</sup> According to the Claimants, the Rodríguez family was not happy with being unable to keep using the road that the Claimants built in 2005. Thus, the Rodríguez requested the District Attorney to have the gates opened.<sup>80</sup> However, the Respondent asserts that the Claimants built the gates at the end of a historic, public, unpaved road that had been used by the Palo Blanco townspeople for more than 80 years. In August 2011, the Palo Blanco townspeople requested the local District Attorney to have the gates to the historical road opened.<sup>81</sup>
90. In September 2011, the District Attorney rejected the request to demolish the gates.<sup>82</sup> The Respondent alleges that the District Attorney decided in favor of the Claimants because they offered the townspeople to use their road to access their land.<sup>83</sup> Despite this ruling, the Claimants continued allowing residents to use the main Jamaca road but requiring them to register the first time they entered the development. The Claimants state that night-time traffic was dissuaded for security reasons, but with advanced permission evening access was allowed.<sup>84</sup>
91. On April 17, 2013, the townspeople raised a complaint at a Municipality of Jarabacoa town hall meeting, which was also attended by Jamaca de Dios' representatives. At the end of the meeting, another meeting was proposed for the next day to be held at the site of the gates before the historical road. However, Jamaca de Dios' representatives were not present.<sup>85</sup>
92. On April 22, 2013, the Municipality of Jarabacoa decided to ask the Claimants to open the gates and have the Commission of Public Works and the Prosecutor's Office work with Jamaca de Dios' representatives, and the area's dwellers and landowners.<sup>86</sup> On the same day, the Municipality of Jarabacoa passed a resolution granting public access to a private road to Jamaca de Dios and

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<sup>79</sup> Reply Memorial, ¶ 233; Second Witness Statement of Michael Ballantine, ¶ 14.

<sup>80</sup> Reply Memorial, ¶ 234.

<sup>81</sup> Statement of Defense, ¶¶ 129-130; *See*, Certification from *Alcalde de Palo Blanco* (May 22, 2013), **Exhibit R-92**; Final Judgment on Recognition of Easement and Removal of Gates, *Sala Tribunal de Tierras Jurisdicción Original-La Vega* (October 5, 2015), pp. 11-12, **Exhibit C-69**.

<sup>82</sup> Resolución de Interés Judicial (September 13, 2011), **Exhibit C-22**.

<sup>83</sup> Statement of Defense, ¶ 130; *See* **Exhibit C-22**.

<sup>84</sup> Reply Memorial, ¶ 236; Second Witness Statement of Michael Ballantine, ¶ 15.

<sup>85</sup> Statement of Defense, ¶ 131; Witness Statement of Leslie Gil Peña, ¶ 11; Video, *Le Niegan la Entrada a Jamaca de Dios a Los Regidores de Jarabacoa*, **Exhibit R-74**.

<sup>86</sup> Jarabacoa Municipality Resolution No. 005-2013 (April 22, 2013), **Exhibit C-23**.

authorizing to tear down the Jamaca de Dios' gates.<sup>87</sup> The Claimant's contend that the resolution was passed only for Jamaca de Dios, and that they were not informed of it.<sup>88</sup> The Municipality had been previously informed that passing the resolution would be unlawful because it is the federal Lands Tribunal which has authority over real property disputes.<sup>89</sup>

93. On June 17, 2013, a group of local people, led by the former Director of Maintenance in Jarabacoa, stormed into Jamaca de Dios and tried to forcibly tear down the three gates.<sup>90</sup> According to the Claimants, a city truck was used to transport the local people and the police only dispersed the crowd after the Claimants' lawyer arrived at La Vega.<sup>91</sup>
94. On the same day, according to the Respondent, the Claimants sought the immediate closure of the historical road before Jarabacoa's Lands Tribunal. The townspeople contested the petition, yet the historical road was closed pending the petition's resolution.<sup>92</sup>
95. On July 31, 2013, the Claimants managed to obtain a preliminary injunction from the Lands Tribunal, prohibiting the Municipality of Jarabacoa from entering the Claimants' property and ordering to rebuild the gates.<sup>93</sup> When the Claimants began the judicial process, the Claimants state that the crowd returned, tore down the provisional gates and made death threats against Mr. Ballantine. Although the police was called, it allegedly refused to come without authorization from the City of Jarabacoa.<sup>94</sup> Despite the injunction, Dominican court officials have declared the Claimants' road to be public.<sup>95</sup>

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<sup>87</sup> Reply Memorial, ¶ 230; Jarabacoa Municipality Resolution No. 005-2013, (April 22, 2013), **Exhibit C-23**.

<sup>88</sup> Reply Memorial, ¶¶ 238-239.

<sup>89</sup> Resolución de Interés Judicial (September 13, 2011), **Exhibit C-22**.

<sup>90</sup> Amended Statement of Claim, ¶ 151; Reply Memorial, ¶ 239; Video of Events at Jamaca Gates (June 17, 2013), **Exhibit C-68**.

<sup>91</sup> Reply Memorial, ¶¶ 240-241; Second Witness Statement of Michael Ballantine, ¶¶ 16-17.

<sup>92</sup> Statement of Defense, ¶ 133; Demanda, La Entidad Comercial La Jamaca De Dios Jarabacoa c. por. a. y Su Presidente Sr. Michael J. Ballantine c. Tonito Duran Aquino y Compartes (June 19, 2013), **Exhibit R-118**; Ordenanza de la Segunda Sala del Tribunal de Tierras Jurisdicción Original – La Vega Provincia La Vega, Decisión No. 02062013000484 (July 31, 2013), **Exhibit C-24**.

<sup>93</sup> Amended Statement of Claim, ¶ 152; Reply Memorial, ¶ 242; Ordenanza de la Segunda Sala del Tribunal de Tierras Jurisdicción Original – La Vega Provincia La Vega, Decisión No. 02062013000484 (July 31, 2013), **Exhibit C-24**.

<sup>94</sup> First Witness Statement of Michael Ballantine, ¶¶ 81-82.

<sup>95</sup> Amended Statement of Claim, ¶ 153; Sentencia, Sala Tribunal de Tierras Jurisdicción Inmobiliaria de La Vega, (October 5, 2015), **Exhibit C-69**.



96. On October 1, 2013, the Claimants requested from the Municipality of Jarabacoa a “no objection” letter for the mountain lodge in Phase 1. The Claimants state that that Municipality of Jarabacoa has refused to act on this request.<sup>96</sup>
97. On October 5, 2015, a new judge assigned to the case ruled against the Claimants, without holding any hearings on the matter.<sup>97</sup> As a result, public access has been granted to the Claimants’ private Jamaca road.<sup>98</sup> However, the Respondent states that the Dominican Government never declared Project 1 road to be a public road.<sup>99</sup>
98. The Claimants also denounce the fact that the Jarabacoa City Council officials acted against them because they expected local businesses to pay the taxes directly to the councilors. The Claimants refused to do so, and instead paid their taxes to the Municipality of Jarabacoa.<sup>100</sup> The Claimants add that the City of Jarabacoa has refused to pay for the streetlights within Jamaca de Dios, even though the federal Government reimburses the City of Jarabacoa for such costs, and it pays for the streetlights in Dominican-owned projects. Likewise, since 2005, the City of Jarabacoa has refused to provide any maintenance on the public road that leads to Jamaca de Dios.<sup>101</sup>

**F. THE CLAIMANTS’ REQUEST TO THE MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES FOR A PERMIT FOR PHASE 2**

**1. The First Phase 2 Inspection by the MMA**

99. On May 22, 2009, MMA officials conducted an environmental inspection at Jamaca de Dios, including men carrying weapons. The Claimants state that they and their employees were treated in a harassing and hostile manner.<sup>102</sup> Mr. Ballantine was allegedly threatened with criminal action for allegedly violating environmental laws. The MMA officials contended that by creating access to Jamaca de Dios, flattening a small space on three lots and removing several small trees, environmental regulations had been violated.<sup>103</sup> Mr. Ballantine recalls that Ms. Francis Santana,

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<sup>96</sup> Amended Statement of Claim, ¶ 149; Reply Memorial, ¶ 225; Letter from Rafelina Díaz to Lucía Sánchez (October 1, 2013), **Exhibit C-20**; Witness Statement of Leslie Gil Peña, ¶¶ 27-36; First Witness Statement of Michael Ballantine, ¶ 39.

<sup>97</sup> Sentencia, Sala Tribunal de Tierras Jurisdicción Inmobiliaria de La Vega, (October 5, 2015), **Exhibit C-69**.

<sup>98</sup> **Exhibits, C-147, C-148.**

<sup>99</sup> Statement of Defense, ¶ 134.

<sup>100</sup> Amended Statement of Claim, ¶ 147; First Witness Statement of Michael Ballantine, ¶ 75.

<sup>101</sup> Amended Statement of Claim, ¶ 148; First Witness Statement of Michael Ballantine, ¶ 76.

<sup>102</sup> Amended Statement of Claim, ¶ 81; Witness Statement of Zuleika Salazar, ¶¶ 9-11; First Witness Statement of Michael Ballantine, ¶¶ 44-46.

<sup>103</sup> Amended Statement of Claim, ¶ 82; Witness Statement of Zuleika Salazar, ¶¶ 9-11; First Witness Statement of Michael Ballantine, ¶¶ 44-46.

the then-MMA local director, said that this type of unannounced, militaristic inspection was unprecedented and unique. Also, Mr. Ballantine claims that Ms. Santana told him that she had no knowledge of any complaint having been lodged against Jamaca de Dios. According to Mr. Ballantine, Ms. Santana stated that the inspection had been ordered by the Minister of the MMA, Mr. Jaime David Mirabal.<sup>104</sup>

100. While the Respondent confirms the inspection occurred, it explains that the visit was not unannounced because the Project 2 license gave the MMA the right to sanction any violations thereof. Thus, it contends that the MMA also had the power to monitor the license's compliance. Several weeks before the inspection, the Claimants were invited to the MMA's office in Jarabacoa to discuss unauthorized work conducted in connection with Project 2. During the meeting, the Claimants stated that they intended to comply with the principles of environmental protection and not to violate the Environmental Law.<sup>105</sup> The Respondent does not consider the visit to be unprecedented because it characterizes the evidence as purely hearsay, denied by Ms. Santana herself, and the Environmental Law obliges permit-holders to allow the monitoring by the relevant authorities.<sup>106</sup> Nor does the Respondent consider the inspection to have been militaristic because it is common for the National Service for Environmental Protection ("SENPA") to accompany MMA officials during their site visits. They wear distinctive green uniforms and carry non-automatic weapons. Although the Respondent cannot confirm whether the SENPA officials were present during the inspection, it does not consider it surprising if they were.<sup>107</sup>
101. In the inspections conducted on May 22, 2009, it was discovered that the Claimants (i) had failed to submit the EC Reports, (ii) had cut certain tree species without authorization, (iii) had engaged in unauthorized ground excavations which interfered with the waterways, and (iv) had divided the lots in a manner different to the development plans the MMA had authorized.<sup>108</sup>

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<sup>104</sup> Amended Statement of Claim, ¶ 83; First Witness Statement of Michael Ballantine, ¶ 45.

<sup>105</sup> Statement of Defense, ¶ 112; Letter from Francis Santana to Jamaca de Dios (April 16, 2009), **Exhibit R-68**; Minutes of Environmental Inspection (May 22, 2009), p. 4, **Exhibit R-65**.

<sup>106</sup> Witness Statement of Francis Santana, ¶ 13; Environmental Law, Art. 45(4) **Exhibit R-3**; Project 2 Permit, p.6, **Exhibit C-4**.

<sup>107</sup> Statement of Defense, ¶ 114; Witness Statement of Jaime David Fernandez Mirabal, ¶ 22; Decree 561-06, Article 2 (November 21, 2006) **Exhibit R-162**.

<sup>108</sup> Minutes of Environmental Inspection (May 22, 2009), **Exhibit R-65**; Letter from MMA to Michael Ballantine (September 22, 2009) and Report of Environmental Inspection (including photographs of land excavations and cut trees) **Exhibit R-66**; Resolution SGA No. 973-2009 (November 19, 2009), **Exhibit C-7**.

## 2. Imposition of the Fine and Meetings between the Parties

102. On November 19, 2009, on the basis of this inspection, the MMA imposed a fine of almost one million Dominican Pesos on Jamaca de Dios.<sup>109</sup> According to the Claimants, this has been the largest fine the MMA has ever imposed in the region to a property owner, and local MMA officials allegedly confessed to them that they considered it “*excessive and arbitrary*”.<sup>110</sup> The Respondent denies this. According to the Respondent, the fine was imposed within the scope of the MMA’s authority since the Project 2 permit reserved the MMA the right to impose fines for breaches of the permit.<sup>111</sup> The MMA also required that the Claimants comply with environmental regulations, undo the environmental damage, suspend work on Project 2 until the fine had been paid, and submit reports proving their compliance every six months.<sup>112</sup>
103. The Respondent explains that the quantity of a fine can be up to 3,000 times the minimum wage applicable at the time of the violation.<sup>113</sup> The Respondent notes that the fine, even before it was reduced by 50%, was not the largest one imposed in the region. In 2013, Aloma Mountain, for example, received a fine of 1.7 million Dominican Pesos.<sup>114</sup>
104. The fine also included an order to complete an EC Report twice every year, which the MMA asserted to be required by law. The Claimants contend that they have submitted the EC Reports for all 15 semi-annual periods but that no Dominican-owned project has been required to do so.<sup>115</sup> The Claimants allege that the only EC Reports submitted to the Respondent – other than those submitted by the Claimants – were three from Paso Alto between 2008 and 2009, and one from Quintas del Bosque in 2014.<sup>116</sup> The Respondent states that the obligation to submit EC Reports can also be found in environmental permits granted to other entities, and that fines have been imposed on other developments for not submitting the required EC Reports.<sup>117</sup>

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<sup>109</sup> Amended Statement of Claim, ¶ 84; Reply Memorial, para 181; Resolución SGA No. 973-2009 (November 19, 2009), **Exhibit C-7**.

<sup>110</sup> Amended Statement of Claim, ¶ 84.

<sup>111</sup> Statement of Defense, ¶ 115.

<sup>112</sup> Environmental Permit No. 0649-07 (Dec. 7, 2007), **Exhibit C-4**.

<sup>113</sup> Statement of Defense, ¶ 115.

<sup>114</sup> Rejoinder on Jurisdiction and Merits, ¶ 138; Environmental Law, Art. 167, **Exhibit R-3**; Cálculo Sanción Administrativa, Residencial Jamaca de Dios (July 10, 2009), p. 8, **Exhibit R-66**; Resolución SGA No. 973-2009 (November 19, 2009) **Exhibit C-7**.

<sup>115</sup> Amended Statement of Claim, ¶ 85; First Expert Report of Graviel Peña, ¶ 28.

<sup>116</sup> Reply Memorial, ¶ 181; Second Expert Report of Graviel Peña, ¶ 8.

<sup>117</sup> Statement of Defense, ¶ 117; Fine On Estación de Servicios Reyna Durán (January 10, 2017) **Exhibit R-72**, in which a fine of RD\$ 245,640.00 was imposed on a Dominican owned project.

105. The Claimants contend that they immediately requested a meeting with the MMA Minister Jaime David Mirabal to discuss the fine. However, the MMA did not respond to the meeting request and refused to discuss or reconsider the fine.<sup>118</sup> The Claimants refused to pay it and kept requesting a meeting.<sup>119</sup>
106. In August 2010, before seeking permission, the Claimants applied for tax-free status for Phase 1 and 2, in accordance with CONFOTUR Law No. 158-01, which intends to promote tourism in the Dominican Republic. On November 10, 2010, the Respondent approved the provisional tax-exemption request.<sup>120</sup> The Claimants point out that this approval was signed by the Dominican Ministries of Tourism, Culture, and Tax, and the MMA, the latter without mentioning the slope restrictions or the establishment of the National Park.<sup>121</sup> The Respondent explains that this process has nothing to do with the environmental permit process and CONFOTUR informed so to the Claimants in the approval.<sup>122</sup>
107. On September 22, 2010, the environmental consultant working with the Claimants on the planned expansion told them that some of their land was within the National Park, a category II protected area.<sup>123</sup> Mr. Ballantine asked what that would mean for their expansion plans. The consultant confirmed that Dominican law allowed projects of low-impact tourism, such as nature tourism or ecotourism, within the protected areas, and specifically referred to the Claimants' project as one of those allowed. While the consultant recognized that the issue of the roads and the management of sewage and waste would have to be discussed, she recommended the Claimants request the terms of reference for their expansion and allow the MMA to visit the development to provide an opinion on technical and legal matters and on the projects' viability. Although – in the opinion of the consultant – the project was considered a permitted activity within a category II protected area, the consultant clarified that MMA would still decide which project would or would not be

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<sup>118</sup> Amended Statement of Claim, ¶ 86; First Witness Statement of Michael Ballantine, ¶ 46.

<sup>119</sup> Amended Statement of Claim, ¶ 86; First Witness Statement of Michael Ballantine, ¶ 46.

<sup>120</sup> Amended Statement of Claim, ¶ 73; Reply Memorial, ¶¶ 96-97; CONFOTUR Provisional Approval (November 10, 2010), **Exhibit C-52**.

<sup>121</sup> Amended Statement of Claim, ¶ 74; CONFOTUR Provisional Approval (November 10, 2010), **Exhibit C-52**.

<sup>122</sup> Rejoinder on Jurisdiction and Merits, ¶ 157; CONFOTUR Provisional Approval (November 10, 2010), p. 3, **Exhibit C-52**.

<sup>123</sup> Reply Memorial, ¶¶ 99(l), 191; Rejoinder on Jurisdiction and Merits, ¶ 153; Email from M. Arcia to Michael Ballantine (September 22, 2010), **Exhibit C-102**.

allowed.<sup>124</sup> The Respondent emphasizes that neither Project 3, nor any part of Jamaca de Dios has been recognized as ecotourism by the MMA.<sup>125</sup>

108. On October 7, 2010, Minister Mirabal allowed for the fine to be reduced by a 50%.<sup>126</sup>
109. On November 30, 2010, the Claimants request permission for the so-called Project 3.<sup>127</sup>
110. On December 13, 2010, the Claimants received a “no objection” letter from the City Council of Jarabacoa, regarding the expansion plans for the hotel and the subdivision of lots. There was no mention of the slope restrictions or the National Park.<sup>128</sup> At the same time, the Claimants requested the MMA to provide the “terms of reference” for the expansion.<sup>129</sup>
111. On December 21, 2010, the Claimants received approval from CONFOTUR for their request for certain tax benefits for Jamaca de Dios. The approval included a signature and seal from the MMA, which made no reference to any slopes in Phase 2.<sup>130</sup> The Respondent points out that CONFOTUR’s granting of the tax benefit is unrelated to the Claimants’ compliance with environmental regulation.<sup>131</sup> The resolution granting the tax benefits states that it “*does not authorize the commencement of construction of the JAMACA DE DIOS project*”.<sup>132</sup>
112. On January 26, 2011, the Claimants’ request for an environmental permit was lodged at the MMA.<sup>133</sup> At the same time, the Claimants continued to purchase land and made plans to buy excavators.<sup>134</sup>

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<sup>124</sup> Reply Memorial, ¶¶ 99(l), 191; Rejoinder on Jurisdiction and Merits, ¶¶ 155-156; Email from M. Mendez to Michael Ballantine (September 29, 2010), **Exhibit C-103**; Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of EMPACA, and Zuleika Ivette Salazar Mejia (September 22-29, 2010), p. 1, **Exhibit R-169**.

<sup>125</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 201-203.

<sup>126</sup> Amended Statement of Claim, ¶ 86; First Witness Statement of Michael Ballantine, ¶ 49; Statement of Defense, ¶ 115.

<sup>127</sup> Rejoinder on Jurisdiction and Merits, ¶ 160; Letter from Zuleika Salazar to Ernesto Reyna (November 30, 2010), p. 1, **Exhibit C-5**; Letter from Roberto E. Cruz, Planificación y Gestión Ambiental, to Michael Ballantine, re City of Jarabacoa No Objection Letter (December 13, 2010), **Exhibit C-91**; First Witness Statement of Michael Ballantine, ¶ 36; Witness Statement of Leslie Gil Peña, ¶ 33.

<sup>128</sup> Letter from Miguel Abreu and Roberto E. Cruz to Michael J. Ballantine (December 13, 2010), **Exhibit C-6**.

<sup>129</sup> Letter from Zuleika Salazar to Ernesto Reyna (November 30, 2010), **Exhibit C-5**.

<sup>130</sup> Reply Memorial, ¶¶ 99(n), 191; **Exhibit C-52**.

<sup>131</sup> Rejoinder on Jurisdiction and Merits, ¶ 157.

<sup>132</sup> **Exhibit C-52**.

<sup>133</sup> Reply Memorial, ¶ 99(n); **Exhibit C-5**.

<sup>134</sup> Rejoinder on Jurisdiction and Merits, ¶ 161; Email from Eric Kay to Michael Ballantine (January 17, 2011), **Exhibit R-268**; Witness Statement of Wesley Proch, ¶ 6.

113. On February 1, 2011, the Claimants decided to pay the fine, since the MMA previously stated that it would not provide the requested terms of reference until the fine was paid.<sup>135</sup>

### 3. First Reconsideration by the MMA at the Claimants' Request

114. On February 14, 2011, the Claimants were granted a meeting with the MMA Minister, Mr. Jaime David Mirabal, the Vice Minister of Protected Areas, Mr. Bernabé Mañón, and the Management Director of Protected Areas, Mr. Ekers Raposa.<sup>136</sup> In the meeting, Mr. Ballantine expressed his opinion that the fine was unjustified but he still was looking forward to working with the MMA regarding Phase 2.<sup>137</sup> According to the Claimants, Minister Mirabal promised to send another inspection team to Jamaca de Dios to investigate the issue and provide a response on the requested expansion. However, there was no mention of the planned expansion being within the boundaries of the National Park.<sup>138</sup> Mr. Omar Rodríguez was also present at the meeting.<sup>139</sup>

115. According to the Claimants, on mid-February, 2011, an inspection team from the MMA visited Jamaca de Dios. The team was welcomed by Mr. Ballantine and Mr. Eric Kay, the expert who helped design and construct the road of Phase 1 and the development of Phase 2. The Claimants contend that the team was “*overwhelmingly positive about the prospects of expansion, never mentioning any issue about slopes or the fact that Phase 2 purportedly*” was inside the National Park.<sup>140</sup> The lead inspector of the MMA team, Mr. César Sena, allegedly recommended seeking permission to expand the road into Phase 2.<sup>141</sup>

116. According to the Respondent, during the February, 2011, site visit the MMA officials took contemporaneous notes that the land was over 40% steep, that the earth movements that would be carried out were major, and that the area provided for the disposal of removed materials was “[i]nadequate/harmful to the environment”. The MMA officials further noted there were risks that (i) the project would significantly contaminate the soil and subsoil, (ii) during the construction phase the primary or secondary forest would be cleared, (iii) the project would have “*a very strong*

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<sup>135</sup> Amended Statement of Claim, ¶ 87; First Witness Statement of Michael Ballantine, ¶ 49.

<sup>136</sup> Reply Memorial, ¶ 99(o); Second Witness Statement of Michael Ballantine, ¶ 54.

<sup>137</sup> Amended Statement of Claim, ¶ 88; First Witness Statement of Michael Ballantine, ¶ 51.

<sup>138</sup> Amended Statement of Claim, ¶ 88; First Witness Statement of Michael Ballantine, ¶ 52; Witness Statement of Omar A. Rodríguez, ¶ 9; Reply Memorial, ¶ 99(o); Second Witness Statement of Michael Ballantine, ¶ 54.

<sup>139</sup> Amended Statement of Claim, ¶ 88.

<sup>140</sup> Amended Statement of Claim, ¶ 89; First Witness Statement of Michael Ballantine, ¶¶ 54-55; Expert Report of Eric L. Kay, ¶ 11.

<sup>141</sup> Amended Statement of Claim, ¶ 90.

*adverse visual impact on the landscape*”, and (iv) a slope greater than 60% had been observed.<sup>142</sup> The Respondent relies on Mr. Zacarías Navarro to explain that the construction of the road was dangerous and complicated, as it was planned to be done at an area located between 900 to 1200 meters above sea level, in the northern face of the Cordillera Central mountain range, where the precipitation levels exceed 1,600 millimeters per year. Also, there would have been a significant “*risk of periodic and irrecoverable environmental harm*”.<sup>143</sup> The MMA, its inspectors, and the Claimants agreed that because the Claimants’ intention was to develop towards the top of the mountain and “*it is virtually impossible to make the subdivision map without first cutting the road*”, the Claimants should first request permission for the construction of the road.<sup>144</sup>

117. On February 24, 2011, the Claimants wrote a letter to the Vice Minister of the MMA, Ernesto Reyna, seeking permission to begin the expansion of the road immediately.<sup>145</sup>
118. On March 18, 2011, there was an inspection on Jamaca de Dios, conducted by an MMA official, Mr. Sócrates Nivar, who purportedly drafted a report dated March 21, 2011.<sup>146</sup> The MMA officials recommended declaring the project “*not viable*” because of the “*environmental fragility of the area and natural risk, the land topography and slope, which is over 60% in much of the area, ...natural run-offs, the characteristics of the buildings being built in the Project area, and a possible violation of Art. 122, Law 64-00*”.<sup>147</sup> According to the Claimants, a copy of the report was never provided to them until the Respondent’s Response to the Notice of Arbitration.<sup>148</sup>
119. On April 21, 2011, the Claimants wrote to the MMA regarding the terms of reference. According to the Claimants, they did not receive an answer.<sup>149</sup>

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<sup>142</sup> Notes from February 17, 2011 Site Visit, **Exhibit R-108**. The Respondent explains that slope incline, referred in Article 122 of the Environmental Law, is a technical term that refers to the distance between two points at different height but along the same horizontal plane. It can be expressed in degree or percentage. The percentage corresponds to the vertical distance over the span of 100 horizontal units, while the degree is calculated by applying an inverse tangent trigonometric function.

<sup>143</sup> First Witness Statement of Zacarías Navarro, ¶¶ 22-24.

<sup>144</sup> Rejoinder on Jurisdiction and Merits, ¶ 167; First Witness Statement of Michael Ballantine, ¶ 55; Letter from Michael Ballantine to Ernesto Reyna (February 24, 2011), **Exhibit C-53**.

<sup>145</sup> Amended Statement of Claim, ¶ 90; Rejoinder on Jurisdiction and Merits, ¶ 167; Letter from Michael Ballantine to Ernesto Reyna (February 24, 2011), **Exhibit C-53**.

<sup>146</sup> Rejoinder on Jurisdiction and Merits, ¶ 168; Site Visit Report (March 21, 2011), **Exhibit R-4**.

<sup>147</sup> Summary of Project 3 Evaluation Chronology (May 11, 2011), **Exhibit R-110**.

<sup>148</sup> Amended Statement of Claim, ¶ 91; First Witness Statement of Michael Ballantine, ¶ 56; Zacarías Navarro, Proceso de cálculo de pendiente para proyectos ubicados en espacios de altura (October 10, 2014), **Exhibit R-9**.

<sup>149</sup> Amended Statement of Claim, ¶ 92; Letter from Michael Ballantine to Ekers Raposo (April 21, 2011), **Exhibit C-54**.

120. On May 18, 2011, the recommendation by the MMA official in the March 21, 2011, report was accepted by the MMA's Technical Evaluation Committee.<sup>150</sup> According to the Claimants, local MMA Director Mr. Graviel Peña was not invited to the committee meeting, contravening MMA policy standards.<sup>151</sup>
121. On May 27, 2011, Mr. Peña wrote to his regional supervisor reporting on non-authorized development in Aloma Mountain. The Claimants contend that his letter was ignored and that the development in Aloma Mountain was not affected.<sup>152</sup>
122. On June 9 and 10, 2011, Mr. Kay reached conclusions similar to those reached by the MMA official during his site visit to Jamaca de Dios on March 18, 2011. He was also concerned about the "*soft soil conditions*" and the water running at the outside edge of the road, increasing water saturation in the soil. He also recognized the existence of a problem with the steep slope areas.<sup>153</sup>
123. On July 15, 2011, the Claimants wrote to the MMA again regarding the status of the report. Once more, they received no response, even though the MMA was visited by Jamaca de Dios' workers and by the environmental company Empaca Redes.<sup>154</sup>
124. On August 22, 2011, Mr. Ernesto Reyna replaced Mr. Jaime David Mirabal as MMA Minister.
125. On September 1, 2011, the Claimants sent a letter to Minister Reyna, personally congratulating him on his new position, inviting him to Jamaca de Dios, and seeking a response to the expansion request.<sup>155</sup>
126. On September 12, 2011, the MMA rejected the expansion request on the grounds that the slopes on the upper portion of the property exceeded the 60% permitted under Article 122 of the Environmental Law and because it was considered an environmentally fragile area, creating a natural risk. Yet, the MMA was willing to assess the viability of any other areas that the Claimants would provide for Project 3.<sup>156</sup> The Respondent points out that the Claimants failed to propose an

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<sup>150</sup> Acta del Comité Técnico de Evaluación (May 18, 2011), **Exhibit R-112**.

<sup>151</sup> Amended Statement of Claim, ¶ 95; First Expert Report of Graviel Peña, ¶ 10.

<sup>152</sup> Amended Statement of Claim, ¶ 140; Letter from Graviel Peña to René Salcedo (May 27, 2011), **Exhibit C-66**.

<sup>153</sup> Rejoinder on Jurisdiction and Merits, ¶ 169; Email from Eric Kay to Michael Ballantine (June 9, 2011), **Exhibit R-267**; Email from Eric Kay to Michael Ballantine (June 10, 2011), **Exhibit R-270**.

<sup>154</sup> Amended Statement of Claim, ¶ 92; Letter from Michael Ballantine to Jamie David Mirabal (July 15, 2011), **Exhibit C-55**; Witness Statement of Zuleika Salazar, ¶ 14.

<sup>155</sup> Amended Statement of Claim, ¶ 93; Letter from Michael Ballantine to Ernesto Reyna (September 1, 2011), **Exhibit C-56**.

<sup>156</sup> Letter from Zoila González de Gutierrez to Michael Ballantine (September 12, 2011), **Exhibit C-8**.



alternative site.<sup>157</sup> The Claimants point out that slope restrictions had never been mentioned by the MMA, even though the land approved in Phase 1 had slopes in excess of 60%.<sup>158</sup>

127. Nevertheless, after this rejection, the permit for Jarabacoa Mountain Garden and Mirador del Pino were approved, even though both developments would have slopes in excess of 60%.<sup>159</sup> The Claimants contend that in those two projects the MMA worked with the owners “*to modify their plans to ensure compliance with regulatory requirements*”.<sup>160</sup> The Respondent explains that the Claimants oversimplify the issue when solely comparing the slopes of the properties. Other factors must be taken into account such as concentration, altitude and environmental impact. The other projects are located in lower altitudes, the access to exploitable land is much easier there and the concentration is much lower than in Project 3.<sup>161</sup>

#### 4. Subsequent Reconsiderations by the MMA of Jamaca de Dios’ Environmental Permit Request

128. As a result of the first denial, the Claimants ceased purchasing land and negotiations on the purchase of Paso Alto.<sup>162</sup>
129. The Claimants state that they acquired the MMA’s own maps for Phase 2 in a public meeting held in Jarabacoa in December 2014. The map would show that the proposed development area does not have any slopes exceeding the 60% limit, revealing the denial’s lack of substantive scientific support.<sup>163</sup> However, the Respondent denies this, as five different site visits were conducted for the Project 3’s permit, and measuring tools were used to analyze the slopes.<sup>164</sup> By applying these

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<sup>157</sup> Rejoinder on Jurisdiction and Merits, ¶ 172.

<sup>158</sup> Amended Statement of Claim, ¶ 97.

<sup>159</sup> Amended Statement of Claim, ¶ 98; Environmental Permission 1956-12, Mirador Del Pino (December 28, 2012), **Exhibit C-29**; Environmental Permission 2245-13, Jarabacoa Mountain Garden (December 30, 2013), **Exhibit C-30**.

<sup>160</sup> Amended Statement of Claim, ¶ 98; Technical Review Report of Jarabacoa Mountain Garden (2012), **Exhibit C-41**; Letter from Zoila Gonzalez de Gutierrez to Santiago Canela Duran (July 25, 2012), **Exhibit C-42**.

<sup>161</sup> Statement of Defense, ¶ 125; Rejoinder on Jurisdiction and Merits, ¶¶ 182-186; First Witness Statement of Zacarías Navarro, ¶¶ 57-65.

<sup>162</sup> Reply Memorial, ¶ 101.

<sup>163</sup> Amended Statement of Claim, ¶ 99; MMA Map of Baiguata Park (from April 12, 2014 public meeting), **Exhibit C-57**.

<sup>164</sup> Statement of Defense, ¶ 123; Report on February 17, 2011 Site Visit (February 17, 2011), **Exhibit R-108**; Report on March 18, 2011 Site Visit (March 21, 2011) **Exhibit R-4**; Informe de Supervisión Proyecto Ampliación Jamaca de Dios, Código 6219 (January 23, 2012), **Exhibit R-105**; Informe de Visita de Análisis Previo (August 28, 2013) p. 3, **Exhibit R-114**.

factors, even Project 2 and 3 are different, albeit both have slopes exceeding 60%. The former is at a lower altitude and thus, there is lower risk of massive landslides.<sup>165</sup>

130. On November 2, 2011, the Claimants requested the MMA to reconsider its decision, stating that no slope in Phase 2 of any area designated for home construction would exceed the 60 *degree* limit, and asking for another inspection team to visit the project. According to the Claimants, MMA did not provide any reports, findings or technical data supporting its rejection and no further inspection of the project was conducted.<sup>166</sup> The Respondent points out that Mr. Ballantine's letter states that no slope would exceed 60 *degrees*, while acknowledging that the slope where the road would be constructed would be equivalent to 34 *degrees*.<sup>167</sup>
131. In contrast to the Claimants' allegation that no further site visit was performed, the Respondent contends that on January 23, 2012, the MMA's officials conducted another site visit.<sup>168</sup> On February 22, 2012, the MMA organized a Technical Evaluation Committee meeting to support the rejection. Mr. Graviel Peña attended the meeting and stated that no technical issues were not discussed, instead only Zacarias Navarro's opinion was requested.<sup>169</sup>
132. On March 8, 2012, the Claimants' request for reconsideration was rejected.<sup>170</sup> The MMA explained that the project was located in lots with slopes between 20 and 37 degrees, which would in turn mean slopes of 36% and 75%, respectively. The Environmental Law prescribes a maximum slope of 60%, not 60 degrees.<sup>171</sup> Also, the MMA asserted that the project would modify the area's natural runoff and the local hydrological and the micro basin's condition, affecting the mountain's ecosystem. Additionally, the type of soil found on the site could only be used for certain purposes. The MMA had considered the Claimants' initial proposal improper, however it became concerned after finding out that their plan was even more ambitious and large than before. Thus, the MMA informed the Claimants that their application file had been closed.<sup>172</sup>

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<sup>165</sup> First Witness Statement of Zacarías Navarro, ¶¶ 70-71.

<sup>166</sup> Amended Statement of Claim, ¶ 101; Letter from Michael Ballantine to Ernesto Reyna (November 2, 2011), **Exhibit C-10**.

<sup>167</sup> Statement of Defense, ¶¶ 139-141; Rejoinder on Jurisdiction and Merits, ¶ 177.

<sup>168</sup> Statement of Defense, ¶ 123; *Informe de Supervisión Proyecto Ampliación Jamaca de Dios, Código 6219* (January 23, 2012), **Exhibit R-105**; *Informe de Visita de Análisis Previo* (August 28, 2013), **Exhibit R-114**.

<sup>169</sup> Amended Statement of Claim, ¶ 102; First Expert Report of Graviel Peña, ¶ 11; Notes of *Comité Técnico de Evaluación*, evaluation of Phase 2 (February 22, 2012), **Exhibit C-94**.

<sup>170</sup> Amended Statement of Claim, ¶ 102; Letter from Zoila González de Gutiérrez to Michael Ballantine (March 8, 2012), **Exhibit C-11**.

<sup>171</sup> Reply to the Notice of Arbitration, ¶¶ 19-20.

<sup>172</sup> **Exhibit C-11**.

133. On March 3, 2012, Mr. Peña wrote to Mr. Reyna, informing of non-permitted development in Aloma Mountain. The Claimants contend that his letter was ignored and that the development in Aloma Mountain was not affected.<sup>173</sup>
134. On August 3, 2012, the Claimants again asked the MMA to reconsider its decision, based on the fact that the extension of the project at that time was located at an area with a pitch of 32 degrees.<sup>174</sup>
135. On December 18, 2012, the MMA rejected the Claimants' second reconsideration request by letter, with the same content as the letter dated March 8, 2012.<sup>175</sup>
136. In May 2013, Mr. Victor Pacheco, the then-Director of the Export and Investment Center, organized and attended a meeting with Mr. Ballantine and Mr. Jean-Alain Rodríguez, the Executive Director of the Export and Investment Center of the Dominican Republic. The Respondent argues that Mr. Ballantine's letter to Jean-Alain Rodríguez was misleading and mischaracterized the issue because it stated that the Claimants had complied with the relevant provisions of the Environmental Law related to the construction of the road.<sup>176</sup>
137. In June 2013, the Claimants sent a letter to the MMA acknowledging the reasons for rejecting the permit but requesting a reconsideration.<sup>177</sup> On the same month, Project 2's permit was renewed for five years.<sup>178</sup> The Respondent points out that during that time the Claimants launched a marketing campaign for Phase 2, with misleading messages, such as the approval of their project and its environmental friendliness. An open house was held in September 2014.<sup>179</sup>

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<sup>173</sup> Amended Statement of Claim, ¶ 141; Letter from Graviel Peña to Ernest Reyna (March 3, 2012), **Exhibit C-67**.

<sup>174</sup> Letter from Michael Ballantine to E. Reyna (Ministry of Environment) (August 3, 2012), **Exhibit C-12**.

<sup>175</sup> Amended Statement of Claim, ¶ 103; Rejoinder on Jurisdiction and Merits, ¶ 189; Letter from Zoila González de Gutiérrez to Michael Ballantine (December 18, 2012), **Exhibit C-13**.

<sup>176</sup> Rejoinder on Jurisdiction and Merits, ¶ 193; Letter from Michael Ballantine to J.A. Rodríguez (CEI-RD) (May 30, 2013), p. 4, **Exhibit R-242**.

<sup>177</sup> Rejoinder on Jurisdiction and Merits, ¶ 190; Letter from Michael Ballantine to MMA (June 4, 2013). The Claimants submitted another, similar letter to the Ministry in July 2013, **Exhibit C-97**; Letter from Leslie Gil Peña to Michael Ballantine (July 4, 2013), **Exhibit C-14**.

<sup>178</sup> Project 2 Permit Renewal (June 20, 2013), p. 3, **Exhibit C-17**.

<sup>179</sup> Rejoinder on Jurisdiction and Merits, ¶ 191; Jamaca de Dios Brochure (undated), p. 4, **Exhibit R-261**; Email from Z. Salazar to Michael Ballantine (November 28, 2013), **Exhibit R-255**; Email from D. Cabrera to Michael Ballantine (September 4, 2014), **Exhibit R-256**.

138. In June 2013, Ms. Nuria Piera investigated the situation around Jamaca de Dios. In her report, she highlighted the differential treatment between Jamaca de Dios and Aloma Mountain, and the alleged political connections between Mr. Domínguez and the MMA.<sup>180</sup>
139. On July 1, 2013, Mr. Victor Pacheco, wrote a letter to the Director of the MMA, Mr. Bautista Gómez Rojas, after having been informed by Mr. Ballantine of the situation in Jamaca de Dios.<sup>181</sup> The next month, Mr. Ballantine received an e-mail from Mr. Pacheco, informing him that Mr. Domínguez was “*neck deep*” in the MMA’s mistreatment of Jamaca de Dios.<sup>182</sup>
140. On July 4, 2013, Empaca Redes submitted to the MMA an extensive engineering and geological report, showing that the slopes in Phase 2 complied with all applicable slope restrictions and other environmental requirements.<sup>183</sup> As alleged by the Claimants, the MMA ignored the report and has not answered to the factual contentions included in it.
141. On July 18, 2013, the Claimants met officials from the U.S. Embassy in Santo Domingo.<sup>184</sup>
142. On July 30, 2013, the U.S. Embassy officials met with Ms. Zoila González from the MMA. By letter dated August 22, 2013, they expressed their concerns regarding the MMA’s treatment of the Claimants.<sup>185</sup>
143. On August 28, 2013, the MMA sent another inspection team to Jamaca de Dios. Mr. Ballantine gave them a tour around Phase 2 and showed them the slope maps, part of the Empaca Redes report, and satellite images showing the unpermitted development of Aloma Mountain. Mr. Ballantine expressed his concern that Jamaca de Dios was being treated unfairly.<sup>186</sup>
144. On September 13, 2013, Mr. Ballantine, his lawyer Mr. Mario Pujols, Ms. Miriam Arcia from Empaca Redes, and Ms. Leslie Gil Peña, the administrator of Jamaca de Dios, met with Mr. Zacarías Navarro, the MMA’s Director of the Environmental Evaluation.<sup>187</sup> Mr. Navarro informed Mr. Ballantine that the planned expansion was within the boundaries of the National

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<sup>180</sup> Amended Statement of Claim, ¶ 142; “Nuria” (<https://www.youtube.com/watch?v=wYLSUM8Zax4>) (June 29, 2013) (last accessed January 3, 2017); Transcript of “Nuria” Report (June 29, 2013), **Exhibit C-25**.

<sup>181</sup> Amended Statement of Claim, ¶ 106; First Witness Statement of Michael Ballantine, ¶¶ 63-64; Letter from Jean Alain Rodríguez to Bautista Rojas Gómez (July 1, 2013), **Exhibit C-26**.

<sup>182</sup> Amended Statement of Claim, ¶ 107; E-mail from V. Pacheco to Michael Ballantine (June 12, 2013), **Exhibit C-58**; First Witness Statement of Michael Ballantine, ¶ 64.

<sup>183</sup> Amended Statement of Claim, ¶ 104; Letter from Leslie Gil Peña to MMA (July 4, 2013), **Exhibit C-14**.

<sup>184</sup> Amended Statement of Claim, ¶ 108; First Witness Statement of Michael Ballantine, ¶ 65.

<sup>185</sup> Amended Statement of Claim, ¶ 108; Letter from Kristina Dunne to Zoila Gonzalez (August 22, 2013), **Exhibit C-59**.

<sup>186</sup> Amended Statement of Claim, ¶ 109; First Witness Statement of Michael Ballantine, ¶ 65.

<sup>187</sup> Amended Statement of Claim, ¶ 110; First Witness Statement of Michael Ballantine, ¶ 66; Witness Statement of Leslie Gil Peña, ¶¶ 38-39.

- Park. According to the Claimants, this was the first time the National Park had ever been mentioned by the MMA, in a written or oral communication.<sup>188</sup>
145. On September 23, 2013, Mr. Navarro visited Jamaca de Dios as part of the reconsideration appeal. He explained to the Claimants that even setting aside the slope and earth movement issues, the area for Phase 2 was within the National Park limits, and so the Project could not move forward.<sup>189</sup>
146. On October 1, 2013, Mr. Ballantine sought redress from President Danilo's office. His requests for assistance were rejected.<sup>190</sup> The Claimants note that an appeal made by Jarabacoa Mountain Garden to the President's office was treated differently: the Presidency directly intervened in the permitting process and the approval was granted for the entire process.<sup>191</sup> However, the Respondent explains that the Presidency reviewed and forwarded the letter to the MMA on October 10, 2013.<sup>192</sup>
147. Two weeks later, the office of the President informed Mr. Ballantine that the letter had been forwarded and that officials from the MMA would be in contact with him in the following days.<sup>193</sup> Regarding the assertion that the President intervened in favor of Jarabacoa Mountain Garden, the Respondent considers it purely hearsay and thus, with no evidentiary value.<sup>194</sup>
148. In October 2013, the Claimants wrote to the Municipality of Jarabacoa to request a "no objection" letter for the construction of the Mountain Lodge.<sup>195</sup>
149. On January 15, 2014, the MMA provided its fourth and final rejection, giving the same reasons as set out before.<sup>196</sup> According to the Claimants, there was no response to the submission provided

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<sup>188</sup> Amended Statement of Claim, ¶ 110; First Witness Statement of Michael Ballantine, ¶ 66; Witness Statement of Leslie Gil Peña, ¶¶ 38-39.

<sup>189</sup> First Witness Statement of Zacarías Navarro, ¶¶ 48-49.

<sup>190</sup> Amended Statement of Claim, ¶ 111; Letter from Michael Ballantine to President Carlos Pared Perez (October 1, 2013), **Exhibit C-60**; Letter from President Danilo Diaz to Michael Ballantine (October 28, 2013), **Exhibit C-61**; Letter from Carlos Pared Perez to Bautista Rojas Gómez (October 10, 2013), **Exhibit C-62**.

<sup>191</sup> Amended Statement of Claim, ¶ 111; Witness Statement of Reynaldo de Rosario, ¶ 9; First Expert Report of Graviel Peña, ¶ 15.

<sup>192</sup> Statement of Defense, ¶ 135; Letter from the Office of the Presidency to M. Ballantine (October 28, 2013), **Exhibit C-61**.

<sup>193</sup> Statement of Defense, ¶ 135; Letter from Michael Ballantine to the Office of the Presidency (October 1, 2013), p. 3, **Exhibit C-60**; Letter from the Office of the Presidency to the Minister of the MMA (October 10, 2013), **Exhibit C-62**; Letter from the Office of the Presidency to Michael Ballantine (October 28, 2013), **Exhibit C-61**.

<sup>194</sup> Statement of Defense, ¶ 135.

<sup>195</sup> Rejoinder on Jurisdiction and Merits, ¶ 207.

<sup>196</sup> Amended Statement of Claim, ¶ 112; Letter from Zoila González de Gutiérrez to Michael Ballantine (January 15, 2014), **Exhibit C-15**.

by the Claimants through Empaca Redes.<sup>197</sup> The letter stated that the Claimants could not develop Phase 2 because it was located within the National Park, which had been designated as a protected area. The Claimants point out that the designation took place in August 2009 by the National Park Decree,<sup>198</sup> yet the letter of January 2014 was the first one relying upon the existence of the National Park to deny Phase 2. Between 2009 and 2014, the Claimants and the MMA exchanged many written and oral communications, in which the National Park was never mentioned. In fact, the Claimants point out that the MMA extended the duration of the permit in Phase 1, despite the fact that a significant portion of it was inside the National Park.<sup>199</sup> The Respondent explains that the final rejection was not based on the creation of the National Park, but rather that the National Park was an additional reason. The application had already been formally rejected on September 12, 2011 and the file was formally closed on March 8, 2012, when the Claimants opted to contest the decision rather than to choose an alternative location.<sup>200</sup> The letter also reminded the Claimants that pursuant to Article 40 of the Environmental Law and to the environmental authorization regulations, any construction, extension, and/or renovation activities of a project cannot be performed if the corresponding environmental authorization has not been granted.<sup>201</sup>

150. The Claimants responded to the MMA's letter, dated January 15, 2014, asking the MMA the reasoning behind the National Park's boundaries, as there did not seem to be "*any coherent environmental, geological, geographic, or altitude-related reason for it to have located the park lines through the middle of their development*".<sup>202</sup> They also asked the MMA to explain the reasons why the National Park Decree was now being applied to reject the Claimants' expansion permit, after being in force for more than four years.<sup>203</sup>
151. In November 2014, the Claimants met with Ms. Katrina Naut, Foreign Trade Director, and Ms. Patricia Abreu, Vice Minister for International Cooperation, to discuss the possibility of suspending the current proceeding.<sup>204</sup>

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<sup>197</sup> Amended Statement of Claim, ¶ 112; Letter from Zoila González de Gutiérrez to Michael Ballantine (January 15, 2014), **Exhibit C-15**.

<sup>198</sup> Decreto Número 571-09 (August 7, 2009), **Exhibit C-16**.

<sup>199</sup> Amended Statement of Claim, ¶ 115.

<sup>200</sup> Statement of Defense, ¶ 141; **Exhibits C-10, C-11 and C-13**.

<sup>201</sup> Rejoinder on Jurisdiction and Merits, ¶ 196; Letter from Zoila González de Gutiérrez to Michael Ballantine (January 15, 2014), p. 2, **Exhibit C-15**.

<sup>202</sup> Amended Statement of Claim, ¶ 145.

<sup>203</sup> Amended Statement of Claim, ¶ 145; Letter from Michael Ballantine to Bautista Rojas Gómez (March 3, 2014), **Exhibit C-1**.

<sup>204</sup> Amended Statement of Claim, ¶ 143; First Witness Statement of Michael Ballantine, ¶ 86.

152. On December 4, 2014, a community meeting was held to discuss the existence of the National Park and the creation of its management plan (the “**Management Plan**”).<sup>205</sup>
153. On December 11, 2014, a meeting was held with the City of Jarabacoa. The City Council officials explained that they knew that the MMA was concerned about Jamaca de Dios’ expansion and thus, they had asked the MMA for further information. The moment they received it, they would contact the Claimants to inform them of the City Council’s position.<sup>206</sup> During the meeting, the Respondent asserts that Ms. Leslie Gil Peña, a representative of the Claimants, verbally withdrew their request for a “no objection” letter, stating that it was unsuitable.<sup>207</sup> The Claimants deny this, relying on the minutes of the meeting. According to the Claimants, Ms. Gil Peña explained that they were seeking first a conditional “no objection” letter, in order to continue pursuing the rest of the necessary permissions for the Mountain Lodge, and later they would request the definitive “no objection” letter.<sup>208</sup>
154. On December 19, 2014, the MMA’s Coordinator for Public Areas, Mr. Pedro Arias, acknowledged the local communities’ frustration at finding out that their property was within the boundaries of the National Park.<sup>209</sup> A draft map provided by the MMA at the community meeting explicitly shows that Jamaca de Dios and Aloma Mountain had been designated as ecotourism areas.<sup>210</sup>
155. On February 16, 2015, the City Council informed the Claimants that if they secured confirmation from the MMA that Project 4 would not give rise to environmental concerns, then the City Council

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<sup>205</sup> Amended Statement of Claim, ¶ 124; Witness Statement of Leslie Gil Peña, ¶ 45. According to the Ley Sectorial de Areas Protegidas, No. 202-04, **Exhibit C-71**, a Management Plan is: “*a technical and policy document containing all decisions about a protected area in which, based strictly based on scientific knowledge and experience of technical applications, establishes prohibitions and specific and standard authorizations and activities that are permitted in protected areas, indicating in detail the form and the exact places where it is possible to perform these activities*” (“[E]s un documento técnico y normativo que contiene el conjunto de decisiones sobre un área protegida en las que, con fundamento estrictamente basado en el conocimiento científico y en la experiencia de las aplicaciones técnicas, establece prohibiciones y autorizaciones específicas y norma las actividades que son permitidas en las áreas protegidas, indicando en detalle la forma y los sitios exactos donde es posible realizar estas actividades.”).

<sup>206</sup> Rejoinder on Jurisdiction and Merits, ¶ 209; Jarabacoa City Council Meeting Minutes (December 11, 2014), p. 9, **Exhibit R-140**; Witness Statement of Leslie Gil Peña, ¶ 33.

<sup>207</sup> Statement of Defense, ¶ 84; Jarabacoa City Council Meeting Minutes (December 11, 2014), p. 9, **Exhibit R-140**.

<sup>208</sup> Reply Memorial, ¶¶ 226-228; **Exhibit R-140**.

<sup>209</sup> Amended Statement of Claim, ¶ 124; Video of Pedro Arias’ Comments (December 19, 2014), **Exhibit C-70**.

<sup>210</sup> Second MMA Map of Baiguarte National Park (December 4, 2014), **Exhibit C-63**.

would provide a “no objection” letter. According to the Respondent, the Claimants did not pursue Project 4 any further.<sup>211</sup>

156. The Management Plan was created before the Respondent submitted its Statement of Defense. In the Management Plan, while ecotourism is allowed, the standard for what constitutes ecotourism has not been fully defined.<sup>212</sup> The Respondent faults any delay in the drafting and issuance of the Management Plan on the limited resources the Dominican Republic has at its disposal to conduct the necessary studies to produce each Management Plan.<sup>213</sup> In any event, the Respondent explains that under Law No. 202-04 on Protected Areas, in a land included under category II, like the National Park, ecotourism is allowed.<sup>214</sup>

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<sup>211</sup> Statement of Defense, ¶¶ 84, 138; Letter from the Jarabacoa City Council to Michael Ballantine (February 16, 2015) **Exhibit R-93**.

<sup>212</sup> Resolution No. 0010-2017, *Plan de Manejo del Parque Nacional Baiguate* (March 20, 2017), with *Plan de Manejo Parque Nacional Baiguate*, **Exhibit R-84**.

<sup>213</sup> Hearing Transcript, Day 4, 1042:5-1043:3 (English).

<sup>214</sup> Statement of Defense, ¶ 142; Law No. 202-04, *Ley Sectorial de Áreas Protegidas*, National Congress (July 24, 2004), **Exhibit C-71**.



#### IV. RELIEF SOUGHT

##### A. THE CLAIMANTS' RELIEF

157. In their Notice of Arbitration and Statement of Claim, the Claimants request that the Tribunal grant the following relief:

(1) declare that Respondent has breached its obligations under the [DR-CAFTA] and international law;

(2) award Claimants monetary damages of not less than US\$20 million (twenty million U.S. dollars) in compensation for losses sustained as a result of Respondent's breaches of its obligations under the CAFTA-DR and international law, including, inter alia, reasonable lost profits, direct and indirect losses (including, without limitation, loss of reputation and goodwill), losses of all tangible and intangible property, and moral damages;

(3) award all costs (including, without limitation, attorneys' fees and all other professional fees) associated with any and all proceedings undertaken in connection with this arbitration, including all such costs undertaken to investigate this matter and prepare this Notice of Arbitration and Statement of Claim, and all such costs expended by Claimants in attempting to resolve this matter amicably with Respondent before serving this Notice of Arbitration and Statement of Claim;

(4) award pre- and post-judgment interest at a rate to be fixed by the Tribunal;

and

(5) grant such other relief as counsel may advise or the Tribunal may deem appropriate.<sup>215</sup>

158. In their Amended Statement of Claim, the Claimants increased the monetary damages to USD 37.5 million deemed as direct damages, and added USD 4 million for moral damages.<sup>216</sup> For their Reply Memorial, the Claimants' monetary damages, as calculated by their expert, Mr. Farrell, were re-assessed to total approximately USD 35.5 million.<sup>217</sup>

159. In their Admissibility Response, the Claimants request the Tribunal to grant the following relief: *"dismiss the Respondent's admissibility and jurisdictional objection. The Tribunal should also order Respondent to pay the Ballantines' costs of defending against this Submission"*.<sup>218</sup>

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<sup>215</sup> Notice of Arbitration, ¶ 94.

<sup>216</sup> Amended Statement of Claim, ¶¶ 275-276.

<sup>217</sup> Second Expert Report of Mr. Farrell, p. 15.

<sup>218</sup> Admissibility Response, ¶ 112.

**B. THE RESPONDENT'S RELIEF**

160. In its Statement of Defense and its Rejoinder, the Respondent requests that the Tribunal grants the following relief:

a. That the Tribunal dismiss all of the Ballantines' claims, on the basis of lack of jurisdiction, inadmissibility, and/or lack of merit;

b. That, in the event that it were to decide that one or more claims are meritorious, the Tribunal decline to grant any damages to the Ballantines, on the basis that their damages calculations are unreliable, erroneous, and/or speculative;

c. That the Tribunal grant to the Dominican Republic all of the costs of the proceeding, as well as the full amount of the Dominican Republic's legal fees and expenses; and

d. That the Tribunal award to the Dominican Republic such other relief as may deem just and proper.<sup>219</sup>

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<sup>219</sup> Statement of Defense, ¶ 346; Rejoinder on Jurisdiction and Merits, ¶ 372.

## V. THE PARTIES' ARGUMENTS ON JURISDICTION

### A. THE RESPONDENT'S ARGUMENTS

#### 1. The Dominican Republic's Consent

161. The Respondent argues that the Claimants bear the burden of establishing the jurisdictional ground for their claims, including the Dominican Republic's consent.<sup>220</sup> Its scope is defined in Article 10.17 of DR-CAFTA, which states that each Contracting Party "*consents to the submission of a claim to arbitration under this Section [B] in accordance with this Agreement*".

162. Article 10.16 explains which types of claims can be submitted to arbitration, by whom, and how. It provides that

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement; and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement; and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.<sup>221</sup>

163. The Respondent focuses on two aspects. First, that only a claimant, as defined by DR-CAFTA Article 10.28 has the right to submit a claim to arbitration under Chapter 10, Section B. Second, that the only type of claim that can be submitted by a claimant is one according to which a

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<sup>220</sup> Statement of Defense, ¶ 9; *Spence International Investments, LLC and others v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, (October 25, 2016), ¶ 239, **Exhibit RLA-3**; *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, (March 5, 2013), ¶ 48, **Exhibit RLA-4**; *National Gas S.A.E. v. Egypt*, ICSID Case No. ARB/11/7, Award (April 3, 2014), ¶ 118, **Exhibit RLA-5**; Hearing Transcript, Day 1, 181:4-15 (English).

<sup>221</sup> DR-CAFTA, Article 10.16, **Exhibit R-10**.

respondent has breached an obligation under Articles 10.1 to 10.14. Accordingly, there is no consent if either the party submitting a claim to arbitration is not a “claimant” as defined by DR-CAFTA, or the claims asserted are not connected to the obligations set out in Articles 10.1 to 10.14. The Respondent argues that in this case neither the Ballantines are “claimants” under the purposes of the DR-CAFTA, nor do their claims involve any obligations under Articles 10.1 to 10.14, due to the fact that neither at the time they submitted their Notice of Arbitration, nor at the time of the alleged violations, their dominant and effective nationality was that of the U.S.<sup>222</sup>

## 2. The Ballantines Do Not Qualify as “Claimants” Under DR-CAFTA

164. The Respondent contends that the Claimants must demonstrate that at the time of the submission of their Notice of Arbitration and Statement of Claim, on September 11, 2004, they qualified as “claimants” under the DR-CAFTA.<sup>223</sup>

165. Under Chapter 10 of the DR-CAFTA, “claimant” is understood as “*an investor of a Party that is a party to an investment dispute with another Party*”.<sup>224</sup> Therefore, in this case, the claimant must be an investor of a Contracting Party other than the Dominican Republic. An “investor of a Party”:

means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.<sup>225</sup>

166. The Respondent points out that the Claimants acknowledge that they have to comply with the definition of “claimant” under the DR-CAFTA, that the issue of whether they are “claimants” is connected to the question of their dominant and effective nationality, and they did not contest that September 11, 2014 was the day on which their claims were submitted to arbitration.<sup>226</sup> However, the Claimants do question whether the date of submission is relevant in the first place.<sup>227</sup>

167. The Respondent emphasizes the importance of the date of submission.<sup>228</sup> First, it argues that should DR-CAFTA be silent on the relevant timing for the question of nationality, the Tribunal

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<sup>222</sup> Notice of Preliminary Objection, ¶ 7; Statement of Defense, ¶¶ 12-13; Hearing Transcript, Day 1, 184:2-7 (English).

<sup>223</sup> DR-CAFTA, Article 10.16.4, **Exhibit R-10**; Procedural Order No. 1, p. 9; Hearing Transcript, Day 1, 184:19-22 (English).

<sup>224</sup> DR-CAFTA, Article 10.28, **Exhibit R-10**.

<sup>225</sup> DR-CAFTA, Article 10.28, **Exhibit R-10**.

<sup>226</sup> Rejoinder on Jurisdiction and Merits, ¶ 37.

<sup>227</sup> Response to the Request for Bifurcation, ¶¶ 16-21; Hearing Transcript, Day 1, 92:20-93:6 (English); Hearing Transcript, Day 5, 1227:20-23 (English).

<sup>228</sup> Rejoinder on Jurisdiction and Merits, ¶ 36; Hearing Transcript, Day 1, 186:5-7 (English).

would be required to decide the issue on the basis of international law, in accordance with Article 10.22. Under international law, one of the relevant dates for purposes of jurisdiction is the date on which “*the moving party avails itself of a remedy*”.<sup>229</sup> Accordingly, jurisdiction must exist at the time the claim was filed, and at the time of the alleged treaty breach, and a State cannot be subject to claims raised by its own dominant and effective nationals before an international forum.<sup>230</sup>

168. Second, it contends that in fact DR-CAFTA is not silent on this issue, but rather that it is connected to the issue of consent. The question is whether the Claimants were allowed to submit their claim at the time they did so. Thus, one would examine the state of affairs on the date of submission.<sup>231</sup>
169. Third, the Respondent rejects the Claimants’ assertion<sup>232</sup> that the issue of dominant and effective nationality only becomes relevant if the investor holds dual nationality at the time of making the investment in the host State. The definition of “claimant” in Article 10.28 would support the position that the relevant time period cannot be earlier than the time when the investment dispute arose.<sup>233</sup>
170. Fourth, the Respondent alleges that even if the Tribunal were to focus on DR-CAFTA’s definition of “investor of a Party”, it would not find any support for the Claimants’ claim that the question on the nationality refers to the date the investment was made. Article 10.28’s definition of “investor of a Party” has two cumulative requirements: (i) there must be a “national of a Party”; and, (ii) the national must attempt to make, is making or has made an investment in the territory of another Party. The notion of dominant and effective nationality is only related to the first requirement. The Respondent does not contest that the second requirement is disjunctive, since it allows for three different options to define someone as an investor.<sup>234</sup> However, if one would follow the Claimants’ arguments not all the options would be relevant. Therefore, the Claimants’ assertion must be rejected.<sup>235</sup>
171. Fifth, the Respondent considers the Claimants’ assertion that the “*Tribunal should not merely take a snapshot in time and, at any specific date, attempt to weigh [as of that date] the Ballantines’*

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<sup>229</sup> Statement of Defense, ¶ 18; *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (May 20, 2014), ¶ 267, **Exhibit RLA-19**; Christoph H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2d. ed. 2009), Art. 25, ¶ 36, **Exhibit RLA-20**.

<sup>230</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 42, 104-106; Hearing Transcript, Day 5, 1343:17-20 (English).

<sup>231</sup> Statement of Defense, ¶ 19.

<sup>232</sup> Response to the Request for Bifurcation, footnote 13.

<sup>233</sup> Statement of Defense, ¶ 20.

<sup>234</sup> Hearing Transcript, Day 1, 185:7-20 (English).

<sup>235</sup> Statement of Defense, ¶ 23; Rejoinder on Jurisdiction and Merits, ¶¶ 38-42.

*connections to the US against their connections to the DR*”,<sup>236</sup> (Emphasis added by the Respondent) is misguided. Further, it points out that the Iran-U.S. Claims Tribunal’s *Malek* decision the Claimants are relying on does not support such a contention.<sup>237</sup>

172. The Respondent contends that because the Claimants held dual nationality at the time of the submission of their claims to arbitration, on September 11, 2014, the question is which nationality was the dominant and effective one at that time.<sup>238</sup> The effective nationality refers to whether there is a genuine connection between the person and the State.<sup>239</sup> The Respondent does not dispute the genuine connection between the Claimants and the United States, nor between them and the Dominican Republic. The dominant nationality refers to which nationality is stronger.<sup>240</sup>
173. Since the DR-CAFTA does not include any standard for determining it, the Respondent proposes to approach the question applying international law. The Respondent relies on case law from the International Court of Justice (the “**ICJ**”), the Italian-United States Conciliation Commission and the Iran-U.S. Claims Tribunal to argue that the adjudicator must take into account several factors, such as the State of habitual residence, the circumstances in which the second nationality was acquired, the subject’s personal attachment for the country, and the center of a person’s economic, social and family life.<sup>241</sup> The Respondent notes that in Procedural Order No. 2 the Tribunal recognized these factors.<sup>242</sup>
174. The Claimants argue that other factors should also be included, *inter alia*, the country of residence of their immediate family, where the Claimants went to college, where their children were born, the primary language spoken at home or, their religious faith and practice.<sup>243</sup> The Respondent states that no jurisprudential, doctrinal or logical support has been offered for the consideration of these factors.<sup>244</sup>

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<sup>236</sup> Response to the Request for Bifurcation, ¶ 23.

<sup>237</sup> *Reza Said Malek v. Iran*, IUSCT, Interlocutory Award, (June 23, 1988), ¶ 14, **Exhibit CLA-51**.

<sup>238</sup> Notice of Preliminary Objection, ¶ 11.

<sup>239</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment, (April 6, 1955), p. 22, **Exhibit RLA-6**; Hearing Transcript, Day 5, 1265:18-24 (English).

<sup>240</sup> Statement of Defense, ¶¶ 27-28; Rejoinder on Jurisdiction and Merits, ¶ 45.

<sup>241</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment, (April 6, 1955), p. 22, **Exhibit RLA-6**; *United States v. Italy*, It.–U.S. Conciliation Commission, Decision, (June 10, 1955), p. 247, **Exhibit RLA-7**; *Case No. A/18*, IUSCT Case No. A/18, Decision No. DEC 32-A18-FT, (April 6, 1984), p. 12, **Exhibit RLA-8**.

<sup>242</sup> Rejoinder on Jurisdiction and Merits, ¶ 47; Procedural Order No. 2, ¶ 25.

<sup>243</sup> Response to the Request for Bifurcation, ¶ 24; Reply Memorial, ¶ 35.

<sup>244</sup> Statement of Defense, ¶ 50; Rejoinder on Jurisdiction and Merits, ¶ 86.

175. When it comes to their immediate family, the Claimants point out that their children went for college to the United States.<sup>245</sup> However, the Respondent argues that the fact that the Claimants chose to stay in the Dominican Republic shows a greater commitment and allegiance to the Dominican Republic.<sup>246</sup> The Respondent considers it irrelevant that the Claimants went to college in the United States before they visited the Dominican Republic for the first time. However, the fact that Ms. Lisa Ballantine went back to Northern Illinois University after she had visited Jarabacoa is relevant, mainly for the studies she decided to undertake.<sup>247</sup> Ms. Lisa Ballantine decided to study ceramic filter manufacturing and the Dominican Republic's history to "*create a social entrepreneurial startup that would focus on clear water*" in Jarabacoa.<sup>248</sup> Instead of indicating a connection with the United States, this fact points to the Dominican Republic.<sup>249</sup>
176. The Respondent considers it entirely irrelevant where the children were born, because the youngest one was born six years before they visited the Dominican Republic for the first time. Regarding the language being spoken at home, the Respondent considers it irrelevant that it was English, because the Claimants do not provide any authority to support their conclusion. In fact, the same can be said of their religious faith and practice.<sup>250</sup>
177. The Claimants also raise two additional factors, the laws regarding dual nationality in the United States and the Dominican Republic, and how both States viewed the Claimants.<sup>251</sup> Yet, the Respondent argues that these factors do not support their position.<sup>252</sup> Regarding their first factor, the Claimants supposedly argued that the Dominicans laws do not matter because Dominican authorities do not respect Dominican citizens and in any case, their Dominican naturalization only represented a "*tenuous*" connection since their citizenship could be taken away.<sup>253</sup> The Respondent rejects these arguments stating that the laws apply irrespective of the private citizens' perceptions of them and their connection was anything but tenuous, thus the circumstances under which naturalization can be taken away are irrelevant here.<sup>254</sup> Regarding the second factor, the Respondent argues that each State's opinion on which nationality was considered dominant is

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<sup>245</sup> Rejoinder on Jurisdiction and Merits, ¶ 53.

<sup>246</sup> Statement of Defense, ¶ 51; Rejoinder on Jurisdiction and Merits, ¶ 59.

<sup>247</sup> First Witness Statement of Lisa Ballantine, ¶ 2.

<sup>248</sup> First Witness Statement of Lisa Ballantine, ¶ 2.

<sup>249</sup> Statement of Defense, ¶ 55.

<sup>250</sup> Statement of Defense, ¶¶ 57-58; Rejoinder on Jurisdiction and Merits, ¶¶ 87-88.

<sup>251</sup> Reply Memorial, ¶¶ 59-75.

<sup>252</sup> Rejoinder on Jurisdiction and Merits, ¶ 89.

<sup>253</sup> Reply Memorial, ¶¶ 73-74.

<sup>254</sup> Rejoinder on Jurisdiction and Merits, ¶ 91.

irrelevant, since neither of the two States had any knowledge that the Claimants had dual nationality.<sup>255</sup>

178. Accordingly, and considering the factors mentioned by the Claimants, the Respondent concludes that the Claimants' dominant and effective nationality was Dominican at the relevant times.<sup>256</sup> The Claimants held their habitual residence in the Dominican Republic, they voluntarily applied for the Dominican citizenship, they had a deep personal attachment with the country and it was the center of their economic, social and family lives.<sup>257</sup>
179. As mentioned above, Mr. Michael Ballantine and Ms. Lisa Ballantine were born in the United States and lived there until 2000, when they moved to the Dominican Republic for a year to work as missionaries.<sup>258</sup> In 2001, they returned to Chicago but they continued to visit the Dominican Republic every year.<sup>259</sup> In 2005, Mr. Ballantine announced to Ms. Ballantine his intention to sell his business in the U.S. and to invest all of their life savings to develop a tropical mountain in the Dominican Republic. The following year, they sold their home and many of their possessions and they moved to the Dominican Republic.<sup>260</sup> On the same year, the Claimants acquired the "permanent resident" status, which was renewed in June 2008.<sup>261</sup>
180. To be perceived as Dominicans by the Dominican government and their clients, the Claimants voluntarily decided to live in Jamaca de Dios and to become Dominican citizens.<sup>262</sup> While the Claimants downplay this fact to a simple pledge to uphold the Dominican laws and constitution,<sup>263</sup> the Respondent emphasizes their obligation to be faithful to the Dominican Republic. The Respondent argues that when a person voluntarily decides to acquire a second nationality, it is in itself an indication that the voluntarily acquired nationality has become the dominant one.<sup>264</sup> As the ICJ in *Nottebohm* held

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<sup>255</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 94-98.

<sup>256</sup> Statement of Defense, ¶ 59. Rejoinder on Jurisdiction and Merits, ¶ 99.

<sup>257</sup> Notice of Preliminary Objection, ¶ 13.

<sup>258</sup> Amended Statement of Claim, ¶ 18; Jamaca de Dios Website, "History" Page (last accessed January 24, 2017), **Exhibit R-11**.

<sup>259</sup> Amended Statement of Claim, ¶ 20; Notice of Intent, ¶ 11.

<sup>260</sup> Greg Wittstock, *A Man and His Mountain, A Woman and Her Heart* (February 27, 2013), **Exhibit R-12**; Notice of Intent, ¶¶ 7, 12.

<sup>261</sup> Certificates of Permanent Residency of Michael and Lisa Ballantine, **Exhibit R-25**.

<sup>262</sup> First Witness Statement of Michael Ballantine, ¶¶ 20, 29, 88.

<sup>263</sup> First Witness Statement of Michael Ballantine, ¶ 88.

<sup>264</sup> United States Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1991-1999*, p. 36, **Exhibit RLA-10**.



[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking a bond of allegiance and his establishment of a new bond of allegiance.<sup>265</sup>

181. The Claimants applied for Dominican citizenship in September 2009.<sup>266</sup> They had to submit several documents, such as a sworn statement that their domicile was in the city of Jarabacoa and a declaration from their attorney stating that the Claimants “*identify closely with Dominican sentiment and customs given their long standing respect for, and period living in, our country, for which reason they would be happy to confirm, legally, their Dominican sentiment*”.<sup>267</sup> They also had to pass an assessment on their written and oral proficiency in Spanish, on their knowledge of Dominican history and culture, and a standard naturalization interview.<sup>268</sup>
182. On December 30, 2009, their applications were approved and thus, the Claimants became naturalized Dominican citizens in 2010. Thereupon, the Claimants exercised their newly acquired nationality in various ways, such as: for travelling,<sup>269</sup> for exercising their right to vote,<sup>270</sup> for filing claims in Dominican courts, or for legal documents, such as contracts or powers of attorney.<sup>271</sup> They also attended church in the Dominican Republic and sent their children to school there.<sup>272</sup> They even used their Dominican nationality in 2010 to request the Dominican nationality for their youngest children.<sup>273</sup> Although their children moved back to the United States for college, the Respondent relies on Ms. Tobi Ballantine’s social media postings to show that she had a stronger

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<sup>265</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 24, **Exhibit RLA-6**.

<sup>266</sup> Letter from the Dominican Ministry of Interior re Michael Ballantine (October 7, 2009), **Exhibit R-14**; Letter from the Dominican Ministry of Interior re Lisa Ballantine (October 7, 2009), **Exhibit R-13**.

<sup>267</sup> Letter from G. Rodríguez to the President of the Dominican Republic, **Exhibit R-17** (translation from Spanish; the original Spanish version states as follows: “Michael J. Ballantine y Lisa Marie Ballantine. [...] se encuentran muy identificada[s] con el sentir y las costumbres dominicanas ya que han tenido un estrecho vínculo [sic] de convivencia y respeto con nuestro país *por lo que le será grato confirmar, de manera legal su sentir dominicano*”).

<sup>268</sup> List of Interview Questions for Dominican Nationality Interview, *Ministerio de Interior y Policia*, **Exhibit R-31**; Results of Michael Ballantine’s Interview, *Secretaria de Estado de Interior y Policia* (May 10, 2009), **Exhibit R-29**; Results of Lisa Ballantine’s Interview, *Secretaria de Estado de Interior y Policia* (May 10, 2009), **Exhibit R-30**; Email from Michael Ballantine to B. Guzman (September 29, 2009), pp. 12-13, **Exhibit R-225**.

<sup>269</sup> Migratory Records for Michael Ballantine and Lisa Ballantine, **Exhibit R-19**.

<sup>270</sup> Jarabacoa Voting Records, **Exhibit R-20** (while the Claimants voted in the 2012 election, they were also eligible for the 2016 election).

<sup>271</sup> Hearing Minutes, La Vega Tribunal de Tierras (September 12, 2013), **Exhibit R-26**; Hearing Minutes, La Vega Tribunal de Tierras (November 21, 2013), **Exhibit R-27**; Notarial Promissory Note (February 8, 2011), **Exhibit R-228**; Draft of Acknowledgement of Payment (March 18, 2011), **Exhibit R-229**; Agreement to Reserve Apartment (December 8, 2013), **Exhibit R-227**; Aroma de la Montaña Power of Attorney (April 2, 2013), **Exhibit R-226**.

<sup>272</sup> First Witness Statement of Michael Ballantine, ¶¶ 89-90.

<sup>273</sup> Josiah and Tobi Ballantine Naturalization File, **Exhibit R-36**.

connection with the Dominican Republic, than to the United States.<sup>274</sup> Accordingly, the Respondent rejects the Claimants' contention that they never acted, felt or were ever perceived as Dominicans or that they were never politically, culturally or socially connected to the Dominican Republic.<sup>275</sup>

183. The Claimants argue that their U.S. bank accounts kept more funds than their Dominican ones. Yet, this reflects activity in the Dominican Republic and the United States. Moreover, they had a separate U.S. bank account for Jamaca de Dios.<sup>276</sup> The Respondent points out that the Claimants assert that they had invested all of their money in the Dominican Republic.<sup>277</sup> Although the Claimants had opened a U.S. retirement and college savings accounts, the accounts were barely used.<sup>278</sup> Furthermore, other sources confirmed that from 2006 onward, their assets were primarily located in the Dominican Republic.<sup>279</sup> Their non-profit organizations, "Jesus for All Nations" and "Filter Pure", mainly operated in the Dominican Republic.<sup>280</sup> Their U.S. tax returns stated the Claimants did not have a salary or earn wages during the relevant time period. If they earned income at that time, 70% came from their activity in the Dominican Republic, like interest payments from Jamaca de Dios.<sup>281</sup> Thus, the Respondent states that the center of their economic life was the Dominican Republic.

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<sup>274</sup> Statement of Defense, ¶ 39; Tobi Ballantine's Twitter Feed (February 27, 2011), (May 20, 2012), (February 26, 2013), (July 1, 2016), (July 4, 2014), (October 21, 2015), **Exhibit R-78**.

<sup>275</sup> Rejoinder on Jurisdiction and Merits, ¶ 57; Second Witness Statement of Michael Ballantine, ¶ 4.

<sup>276</sup> Account Balance Summary, Jamaca de Dios (December 2010), p. 1, **Exhibit R-239**. The name of the account is "Michael J. Ballantine DBA [i.e. doing business as][...] La Jamaca de Dios".

<sup>277</sup> Notice of Intent, ¶ 7.

<sup>278</sup> Ameritrade Statement (2010), p. 3, **Exhibit R-233**; Ameritrade Statement (2011), p. 3, **Exhibit R-234**; Ameritrade Statement (2012), p. 3, **Exhibit R-235**; Ameritrade Statement (2013), p. 3, **Exhibit R-283**; Ameritrade Statement (2014), p. 3, **Exhibit R-232**; College Savings Account Records for the Ballantine Children, **Exhibit R-238**.

<sup>279</sup> Greg Wittstock, *A Man and His Mountain, A Woman and Her Heart* (February 27, 2013), **Exhibit R-12**; First Witness Statement of Michael Ballantine, ¶ 85.

<sup>280</sup> First Witness Statement of Michael Ballantine, ¶ 3; First Witness Statement of Lisa Ballantine, ¶¶ 5, 8; Emails between Leslie Gil Peña, Jamaca de Dios SRL, and R. Chong, Banco BHD (May 2014), **Exhibit R-217**.

<sup>281</sup> The five U.S. tax returns that the Claimants produced during document production reflect a total combined income of USD 370,553 between 2010 and 2014; Ballantines' U.S. Tax Return (2010), p. 10, **Exhibit R-244**; Ballantines' U.S. Tax Return (2011), p. 10, **Exhibit R-245**; Ballantines' U.S. Tax Return (2012), p. 7, **Exhibit R-246**; Ballantines' U.S. Tax Return (2013), p. 6, **Exhibit R-247**; Ballantines' U.S. Tax Return (2014), p. 6, **Exhibit R-248**. Of that amount, USD 255,000 is attributed to interest payments from Jamaca de Dios; USD 180 is attributed to interest payments from Dominican banks; USD 156 is attributed to interest payments from a U.S. bank; USD 39,167 is attributed to interest payments from a man by the name of Doug Koerner; and USD 76,050 is described as a "capital gain" associated with the Florida "investment property," discussed above, that the Ballantines have attempted to pass off as their "residence."; **Exhibit R-244**, p. 16; **Exhibit R-245**, p. 13; **Exhibit R-246**, p. 10; **Exhibit R-247**, p. 9; **Exhibit R-248**, pp. 8, 10.

184. At the time of September 11, 2014, the Claimants had lived for eight years in the Dominican Republic, their permanent residence in law and spirit. They had their own community there, which they designed to promote their vision of social life.<sup>282</sup> At some point, they came to consider themselves as Dominican.<sup>283</sup> In fact, when the Claimants moved back to the United States in the summer of 2015, they stated that they “*have been gone for so long that I feel out of touch with american [sic] society. The culture is so different than when I left 10 years ago. I feel such a culture shock coming back*”.<sup>284</sup> Indeed, the Claimants ended up claiming moral damages to the Dominican Republic in this arbitration for allegedly forcing them to sell their home and leave their friends and colleagues.<sup>285</sup>
185. According to the Respondent, U.S. law, case law and doctrine support a similar conclusion: that the Claimants’ dominant and effective nationality at paramount times was the Dominican. In the *Sadat v. Mertes* case, the court held that the plaintiff’s voluntary naturalization indicated that his dominant nationality was the one he acquired. Additionally, the fact that the plaintiff did not take all reasonable steps to avoid or quit his status as a U.S. national, was sufficient evidence of his continued, voluntary association with the U.S. and his intention to remain there.<sup>286</sup> The U.S. State Department embraced the *Sadat* decision in the U.S. Digest on International Law (1991-1999).<sup>287</sup>
186. The state of habitual residence is considered one of the most important factors in the analysis.<sup>288</sup> According to the Respondent, although the Claimants were born and lived most of their lives in the United States, their connection to the United States did not remain unbroken for the entirety of the Claimants’ lives.<sup>289</sup> As Ms. Lisa Ballantine confessed in June 2015, she had spent almost

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<sup>282</sup> Amended Statement of Claim, ¶ 42; First Witness Statement of Michael Ballantine, ¶¶ 20, 23-24.

<sup>283</sup> Jamaca de Dios Website, “History” Page (last visited January 24, 2017), (quoting Michael Ballantine as follows: “This year in the Dominican Republic transformed our families and during that time we developed a deep love and passion for the people and culture of this beautiful [sic] island”), **Exhibit R-11**; Transcript of “Nuria” Report (June 29, 2013), p. 10 (quoting Lisa Ballantine as follows: “We love the Dominican Republic, it is our country, I am Dominican now...”), **Exhibit C-25**; Amended Statement of Claim, ¶ 322 (going so far as to claim moral damages for the fact that they allegedly “were forced to sell their home and leave their friends and colleagues in the Dominican Republic...”).

<sup>284</sup> Lisa Ballantine’s Facebook Profile Page (May 3, 2015), p. 109, **Exhibit R-37**.

<sup>285</sup> Amended Statement of Claim, ¶ 322.

<sup>286</sup> *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980) (per curiam), pp. 1187-1188, **Exhibit RLA-9**.

<sup>287</sup> United States Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1991-1999*, pp. 36-37.

<sup>288</sup> United States Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1991-1999*, p. 36.

<sup>289</sup> Response to the Request for Bifurcation, ¶ 32.

one third of her life in the Dominican Republic.<sup>290</sup> Even their travel records between 2010 and 2014 show that the Dominican Republic was their home base.<sup>291</sup>

187. Although the Claimants argue in their Notice of Arbitration and Statement of Claim that the United States was the State of their dominant and effective nationality,<sup>292</sup> the Respondent alleges that the evidence provided does not match with the latter statement.<sup>293</sup> The Claimants state that they have always maintained one or two residences in the United States and they provide a list of five different addresses.<sup>294</sup> They even contend that their contact details are the following “*Michael and Lisa Ballantine*[,] 951 Grissom Trail[,], Elk Grove Village, [Illinois, USA] 60007”.<sup>295</sup> Nevertheless, the Respondent states that there was no evidence that the Claimants lived on any of those five locations, since they acquired their Dominican nationality and until they submitted their claims to arbitration.<sup>296</sup> Since 2006, their permanent residence was in the Dominican Republic.<sup>297</sup> Furthermore, the house at 951 Grissom Trail, belongs to Mr. Michael Ballantine’s mother and her husband.<sup>298</sup>
188. Accordingly, the Respondent considers it irrelevant whether the Claimants were born in the United States and kept their U.S. nationality when they decided to acquire the Dominican nationality.<sup>299</sup> The relevant question is which nationality has been indicated for their residence and other voluntary associations,<sup>300</sup> which in the case of the Claimants is Dominican.<sup>301</sup>

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<sup>290</sup> Lisa Ballantine’s Facebook Profile Page (June 10, 2015), p. 98, **Exhibit R-37**; Lisa Ballantine’s Website, “About” page (last visited May 18, 2017), **Exhibit R-79**.

<sup>291</sup> Rejoinder on Jurisdiction and Merits, Figure 4.

<sup>292</sup> Notice of Arbitration, ¶ 21.

<sup>293</sup> Rejoinder on Jurisdiction and Merits, ¶ 69.

<sup>294</sup> Reply Memorial, ¶ 37.

<sup>295</sup> Notice of Arbitration, ¶ 11. In their U.S. tax returns they provide a different address. However, the Respondent explains that the address provided corresponds to an airport hangar operated by the company “Missionary Flights International”, which offers mail delivery services to the Dominican Republic; Contact MFI, Missionary Flights International Website (last visited March 16, 2018), **Exhibit R-252**.

<sup>296</sup> Rejoinder on Jurisdiction and Merits, Figure 5 to see the Respondent’s arguments on why the Claimants could not have lived in any of those locations during the relevant time period.

<sup>297</sup> Certificates of Permanent Residency of Michael Ballantine and Lisa Ballantine, **Exhibit R-25**.

<sup>298</sup> Cook County Deed Record for 951 Grissom Trail (listing Linda L. Merrick and William A. Merrick Jr. as the owners of the property at 951 Grissom Trail, and noting that Linda and William Merrick are husband and wife) **Exhibit R-21**; Lexis Report: Linda L. Merrick (confirming that Ms. Merrick’s maiden name was Linda Louis Mortenson), **Exhibit R-22**; Birth Certificate of Michael Ballantine (listing Linda Louise Mortenson as Michael Ballantine’s mother, **Exhibit R-23**.

<sup>299</sup> Notice of Preliminary Objection, ¶ 25; United States Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1991-1999*, pp. 36-37.

<sup>300</sup> Rejoinder on Jurisdiction and Merits, ¶ 51; United States Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1991-1999*, p. 4, **Exhibit RLA-10**.

<sup>301</sup> Notice of Preliminary Objection, ¶ 25.

**3. The Ballantines' Claims Do Not Involve Obligations Under Articles 10.1 to 10.14 of DR-CAFTA**

189. The Respondent contends that the second takeaway from Article 10.16 of the DR-CAFTA is that an arbitration is only permissible under the DR-CAFTA if the claim refers to obligations breached under Articles 10.1 to 10.14.<sup>302</sup> The Claimants contend that the Respondent has breached its obligations under Articles 10.3 (National Treatment); 10.4 (Most-Favored-Nation Treatment); 10.5 (Minimum Standard of Treatment); 10.7 (Expropriation and Compensation); and 10.18 (Transparency).<sup>303</sup>
190. As a threshold matter, the Respondent points out that Article 10.18 is titled “Conditions and Limitations on Consent of Each Party” – not “Transparency”. The Respondent presumes that the Claimants refer to Article 18 but in that case, the claim exceeds the scope of the Respondent’s consent to arbitration.<sup>304</sup> The Claimants have amended their claims and state that it actually refers to a violation of Article 10.5 with Chapter 18 as a guide.<sup>305</sup> The Respondent argues that the contents of Chapter 18 cannot be imported to Chapter 10 if the Contracting Parties did not provide for it. To do so would be going against the interpretative principle *expressio unius est exclusio alterius*.<sup>306</sup>
191. According to the Respondent, almost all of the claims are based on alleged State actions that supposedly took place between November 30, 2010 – when the Claimants requested permission from the MMA to expand Jamaca de Dios –, and March 11, 2014 – six months after the events giving rise to the claim occurred.<sup>307</sup> These claims exceed the scope of the Dominican Republic’s consent because (i) its consent only applies to claims that hold that the Respondent breached an obligation under Articles 10.1 to 10.14; (ii) a State action can only be deemed to have breached an international obligation if the State is bound by it at the time the breach occurred; and (iii) at the time of the acts alleged by the Claimants, the Dominican Republic was not bound by the obligations invoked by the Claimants.<sup>308</sup>

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<sup>302</sup> Statement of Defense, ¶ 60.

<sup>303</sup> Amended Statement of Claim, ¶ 15.

<sup>304</sup> Statement of Defense, ¶ 62; Rejoinder on Jurisdiction and Merits, ¶ 102.

<sup>305</sup> Reply Memorial, ¶ 421.

<sup>306</sup> Rejoinder on Jurisdiction and Merits, ¶ 103.

<sup>307</sup> Notice of Preliminary Objection, ¶ 30; DR-CAFTA, Article 10.16.3, **Exhibit R-10**; Notice of Intent, ¶ 22; Notice of Arbitration, ¶ 4.

<sup>308</sup> Notice of Preliminary Objection, ¶ 31, Statement of Defense, ¶ 64; Rejoinder on Jurisdiction and Merits, ¶ 104.

192. All the DR-CAFTA provisions invoked by the Claimants apply only to “covered investments” and “investors of another Party”.<sup>309</sup> The term “covered investment” is defined in Article 2.1 as an investment in the territory of one of the Contracting Party owned by an investor of another Contracting Party.<sup>310</sup> In the present case, “the investor of another Party” is a person attempting to make, making or who has made an investment in the Dominican Republic and whose dominant and effective nationality is the U.S. nationality. Therefore, the Claimants have to demonstrate that their U.S. nationality was their dominant and effective nationality at the time the alleged illegal State conduct took place, in order to establish the Dominican Republic’s consent to arbitration.<sup>311</sup>
193. The Respondent contends that the Claimants’ dominant and effective nationality through the relevant time period was Dominican. As a result, they cannot be considered U.S. investors; their investment does not comply with the definition of “covered investments”; the obligations invoked by the Claimants do not apply; and, therefore the Tribunal lacks jurisdiction.<sup>312</sup>
194. Again, the Claimants argue that the Tribunal must look at the nationality the Claimants held at the time they made their investment in the Dominican Republic.<sup>313</sup> The Respondent rejects this allegation on the basis of the same arguments raised in the previous section.<sup>314</sup> Previous investment arbitration tribunals have concluded that the date of an alleged treaty violation is a fundamental jurisdictional requirement.<sup>315</sup> In *Pac Rim*, the tribunal held that under DR-CAFTA the nationality requirements must be fulfilled at the time of the alleged breach.<sup>316</sup> Furthermore, Article 44 of the Articles on State Responsibility states that “[t]he responsibility of a State may not be invoked if: (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims”.<sup>317</sup>

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<sup>309</sup> DR-CAFTA Articles 10.3, 10.4, 10.5 and 10.7, **Exhibit R-10**.

<sup>310</sup> DR-CAFTA Article 2.1, **Exhibit R-10**.

<sup>311</sup> Notice of Preliminary Objection, ¶ 33; Statement of Defense, ¶ 67; Rejoinder on Jurisdiction and Merits, ¶¶ 105-106.

<sup>312</sup> Notice of Preliminary Objection, ¶ 34; Statement of Defense, ¶ 69; Rejoinder on Jurisdiction and Merits, ¶ 108.

<sup>313</sup> Hearing Transcript, Day 1, 92:20-93:6 (English); Hearing Transcript, Day 5, 1227:20-23 (English).

<sup>314</sup> *See supra*, Section V.A.2.

<sup>315</sup> *Serafin García Armas y Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction (December 15, 2014), ¶ 214; *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (March 24, 2016), ¶ 327, **Exhibit CLA-62**; *ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (July 18, 2013), ¶¶ 299-300.

<sup>316</sup> *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction (June 1, 2012), ¶ 3.34, **Exhibit RLA-22**.

<sup>317</sup> Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission (2001), Art. 44(a).

## **B. THE CLAIMANTS' ARGUMENTS**

### **1. The Claims Were Submitted in Accordance With DR-CAFTA**

195. The Claimants do not debate the Respondents' arguments on the DR-CAFTA framework and "*its foundation upon consent of the parties*".<sup>318</sup> They acknowledge that they have to comply with the DR-CAFTA definition of "claimant" in order to pursue relief for their claims.<sup>319</sup>
196. Their claims were submitted (i) on their behalf under DR-CAFTA Article 10.16(1)(a); and (ii) on behalf of their enterprises incorporated in the Dominican Republic, directly or indirectly owned or controlled by the Claimants under DR-CAFTA Article 10.16(1)(b). The Claimants own or control several Dominican enterprises such as Jamaca de Dios SRL, Aroma de la Montana, E.I.R.L., Pino Cipres Investments SRL, Pina Aroma Investments SRL, and Upper Dreams Investments SRL but they also have other ownerships and concessions.<sup>320</sup> These investments qualify as such under Article 10.28.<sup>321</sup>

### **2. The Ballantines Qualify as "Claimants" Under the DR-CAFTA**

197. The Claimants argue that they have always been dominantly and effectively U.S. citizens.<sup>322</sup> As mentioned above,<sup>323</sup> they acknowledge that they have to comply with the DR-CAFTA definition of "claimant". As a result, they have to be investors of a Contracting Party, other than the Dominican Republic, attempting to make, making or who have made an investment in the Dominican Republic. The Claimants consider this a disjunctive definition and so, any of the three tenses can be used to determine who can be defined as a claimant.<sup>324</sup>
198. Accordingly, the Claimants argue that the Tribunal should only look at the nationality of the Claimants "*as of the time that they made their investment in the Dominican Republic*".<sup>325</sup> (Emphasis omitted) According to the Claimants, the reference to "dominant and effective nationality" only becomes relevant if the investor has dual nationality at the time the investment was made. Since a great part of the land at issue in this arbitration was acquired by the Claimants

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<sup>318</sup> Response to the Request for Bifurcation, ¶ 17; Rejoinder on Jurisdiction and Admissibility, ¶ 24.

<sup>319</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 24.

<sup>320</sup> Notice of Arbitration, ¶¶ 16-19, 22-23.

<sup>321</sup> Statement of Defense, ¶ 159.

<sup>322</sup> Notice of Arbitration, ¶ 21.

<sup>323</sup> *See supra* ¶ 195.

<sup>324</sup> Reply Memorial, ¶ 19; Rejoinder on Jurisdiction and Admissibility, ¶ 26.

<sup>325</sup> Response to the Request for Bifurcation, ¶ 19; Hearing Transcript, Day 1, 92:20-93:6 (English); Hearing Transcript, Day 5, 1227:20-23 (English).

well before they became Dominican citizens, they conclude that they have the explicit right under the DR-CAFTA to make their claims. Thus, these jurisdictional objections should fail.<sup>326</sup>

199. Even if they have to establish that they were dominantly U.S. citizens at the time of submission of their Notice of Arbitration, the Claimants argue that they still would not be required to demonstrate that they were dominantly U.S. citizens during the time their claims arose. This would not be specifically required by DR-CAFTA and the provisions on dual nationality would be silent on the time frame of the evaluation. In any case, the Claimants consider it unnecessary to decide on the appropriate time frame for the evaluation of the dominant nationality, since the Claimants at all times have been dominantly and effectively U.S. citizens.<sup>327</sup>
200. The Claimants agree with the Respondent that for the purposes of Article 10.28 there is no test to decide which of the two nationalities should be considered dominant. DR-CAFTA Article 10.28 simply sets out a non-exhaustive list of qualified investments. The Claimants claim that their investments are listed in Article 10.28.<sup>328</sup> By contrast, to determine which of the two nationalities should be considered dominant the Tribunal should resort to international law.<sup>329</sup>
201. The Claimants hold that the Iran-U.S. Claims Tribunal's decisions the Respondent relies upon relate to entirely different circumstances and arise under an entirely different treaty. Thus, although they can provide guidance on the factors that should be considered in order to decide on the dominant nationality, they should not serve as precedents.<sup>330</sup> The Claimants contend that the Respondent's interpretation of the factors is incomplete and too narrow in their timespan. In *Malek v. Islamic Republic of Iran*, the tribunal interpreted the *A/18* decision as requiring it to look at "*the entire life of the [c]laimant, from birth, and all the factors which, during this span of time, evidence the reality and sincerity of the choice of national allegiance.*"<sup>331</sup> (emphasis added by the Claimants) Accordingly, the Claimants argue that the tribunal "*need not merely take a snapshot in time and, at any specific date, attempt to weigh the Ballantines' connections to the US against their connections to the DR*".<sup>332</sup> The Tribunal should not only look at the time period between 2010 and 2014 – i.e. after the Claimants acquired the Dominican citizenship –, but their entire life

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<sup>326</sup> Reply Memorial, ¶ 19; Rejoinder on Jurisdiction and Admissibility, ¶ 27.

<sup>327</sup> Response to the Request for Bifurcation, ¶ 16; Reply Memorial, ¶ 21; Hearing Transcript, Day 5, 1221:2-7 (English).

<sup>328</sup> Amended Statement of Claim, ¶ 157.

<sup>329</sup> Reply Memorial, ¶¶ 60-62.

<sup>330</sup> Reply Memorial, ¶¶ 22-23.

<sup>331</sup> *Reza Said Malek v. Iran*, IUSCT, Interlocutory Award, (June 23, 1988), **Exhibit CLA-51**.

<sup>332</sup> Response to the Request for Bifurcation, ¶ 23.



to determine whether they are more closely aligned with the United States or the Dominican Republic.<sup>333</sup>

202. The Claimants recognize<sup>334</sup> that the Tribunal held in Procedural Order No. 2 the relevance of certain factors such as, “*the State of habitual residence, the circumstances in which the second nationality was acquired, the individual’s personal attachment for a particular country, and the center of the person’s economic, social and family life.*”<sup>335</sup> Additionally, the Tribunal should consider other factors, *inter alia*: (i) the country of residence of the Claimants’ entire family; (ii) where the Claimants went to college; (iii) where their children were born; (iv) the primary language spoken at home; (v) their religious faith and practice.<sup>336</sup> In their Reply Memorial, the Claimants state additional factors: (i) the Claimants’ motivation to become dual nationals, (ii) their entire life; which includes but is not limited to the facts at the relevant times; (iii) how they viewed themselves; (iv) how the United States and the Dominican Republic and their nationals viewed the Claimants; and (v) the laws regarding nationality in the two states.<sup>337</sup>
203. The Claimants argue that this is not a treaty-shopping situation. The Claimants have always been U.S citizens, yet they acquired Dominican citizenship six years after they made their investment because they realized how Dominican officials treated foreigners. They maintained a residence in the Dominican Republic to supervise and develop their investment. However, they moved back permanently to the United States when they suffered the treaty violations by the Respondent.<sup>338</sup> Since the Tribunal acknowledged, “*that the same facts would necessarily have a bearing or would be relevant for both the procedural and the substantive determination*”,<sup>339</sup> (emphasis added by the Claimants) the Claimants contend that the differential treatment received by the Claimants, compared to the treatment received by other Dominican investors, should be relied on when deciding whether they are dominantly U.S. or Dominican citizens.<sup>340</sup>
204. The Claimants reject the Respondent’s approach to determine which nationality is the dominant and effective one. According to them, the Respondent’s approach is legally and factually unsubstantiated. The *Nottebohm* opinion concerned the issue of diplomatic protection and

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<sup>333</sup> Reply Memorial, ¶¶ 34-36; Rejoinder on Jurisdiction and Admissibility, ¶¶ 10, 32; Hearing Transcript, Day 1, 58:5-9 (English).

<sup>334</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 10.

<sup>335</sup> Procedural Order No. 2, ¶ 25.

<sup>336</sup> Response to the Request for Bifurcation, ¶ 24; Reply Memorial, ¶ 35.

<sup>337</sup> Reply Memorial, ¶ 24; Rejoinder on Jurisdiction and Admissibility, ¶ 16.

<sup>338</sup> Response to the Request for Bifurcation, ¶ 25; Reply Memorial, ¶¶ 31-33; Rejoinder on Jurisdiction and Admissibility, ¶¶ 14, 33, 40.

<sup>339</sup> Procedural Order No. 2, ¶ 29.

<sup>340</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 18.

whether one could rely upon a nationality which had been granted “*in exceptional circumstances of speed and accommodation*” and without a substantial bond, or the nationality with which it had a long-standing and close connection. The Respondent’s reliance<sup>341</sup> on the U.S. State Department report would also be incorrect because the case cited by the report supports the Claimants’ position.<sup>342</sup> The applicant in that case was found to be a U.S. national – despite residing in Egypt – because of his continued, voluntary association with the United States and his wish to remain a U.S. citizen.<sup>343</sup> Yet, in this case the Claimants argue that there is no doubt about the Claimants’ genuine and lifetime U.S. citizenship.<sup>344</sup>

205. According to the Claimants, the *Sadat v. Mertes* case was relied on by the Respondent to contend that the Claimants’ voluntary naturalization in the Dominican Republic is proof of the dominant nationality by itself.<sup>345</sup> However, the *Sadat* case is inapplicable because in that case the subject renounced any allegiance to foreign states when acquiring U.S. citizenship. In the Claimants’ case, there was no such requirement to become Dominican citizens. Even if they did swear faith to the Dominican Republic, they did not renounce their U.S. citizenship.<sup>346</sup>
206. The Claimants obtained Dominican citizenship six years after making their initial land purchase in Jarabacoa in July 2004. Although at the beginning they intended to manage their investment from Chicago, later it became apparent that they needed to be present and they started to reside in the Dominican Republic from August 2006 onwards.<sup>347</sup> For the Claimants, their choice to apply for the Dominican nationality was a business decision made as a result of the discriminatory treatment given by Dominican officials to foreigners, because of Jamaca de Dios’ market conditions and to demonstrate their commitment to their investment.<sup>348</sup>
207. The Claimants state that the Respondent attempts to equate residency with dominant nationality. However, the Claimants contend that this is not the test. While the Claimants lived in the Dominican Republic, they always maintained at least one residence, or even two, in the United States:

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<sup>341</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 51, 67, 72; Hearing Transcript, Day 1, 190:8-13 (English); Hearing Transcript, Day 5, 1266:9-14 (English).

<sup>342</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 13.

<sup>343</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 13.

<sup>344</sup> Rejoinder on Jurisdiction and Admissibility, footnote 36.

<sup>345</sup> Rejoinder on Jurisdiction and Merits, footnote 103; Hearing Transcript, Day 1, 190:14-20 (English).

<sup>346</sup> Response to the Request for Bifurcation, ¶ 29; Reply Memorial, ¶¶ 14, 72.

<sup>347</sup> First Witness Statement of Michael Ballantine, ¶ 17; Second Witness Statement of Michael Ballantine, ¶ 1.

<sup>348</sup> Response to the Request for Bifurcation, ¶¶ 30-31; Amended Statement of Claim, ¶ 155.

- a) From March 1, 1994 through August 18, 2011, the Ballantines owned a residence at 33w231 Brewster Creek Circle in Wayne, Illinois;
- b) On October 1, 2010 through December 31, 2011, the Ballantines rented a home at 1163 Westminster Avenue in Elk Grove Village, Illinois;
- c) On December 2, 2011, the Ballantines purchased a home at 850 Wellington Avenue, Unit 206, in Elk Grove Village, Illinois, and sold this home in November of 2015;
- d) on April 19, 2012, the Ballantines purchased a home at 3831 SW 49th Street, in Hollywood, Florida, and sold that home on March 28, 2014;
- e) on July 15, 2015, the Ballantines rented a home at 505 N. Lake Shore Drive, Unit 4009, in Chicago, Illinois.<sup>349</sup>

208. The Claimants disagree with the Respondent's use of the word "permanent" to describe the Claimants' move to the Dominican Republic.<sup>350</sup> The jurisdictional attestation in the Notice of Intent plainly stated that the Claimants maintained their permanent residence in Chicago.<sup>351</sup> The mail-forwarding facility was established to ensure the arrival of important mail to a single location.<sup>352</sup> Also, the Claimants informed Mr. Ballantine's parents' address for the purposes of this arbitration because they were unsure where to live and they wanted to ensure they would be notified of any procedural events in these arbitration proceedings.<sup>353</sup>

209. The personal attachment of an individual for a particular country is one of the factors to be considered by the Tribunal. The Claimants emphasize their deep connection to U.S. culture and society,<sup>354</sup> while they were only connected with the Dominican Republic for commercial reasons.<sup>355</sup>

210. The Claimants allege that only initially was all their capital was invested in Jamaca de Dios. The funds for the investment originated from Mr. Michael Ballantine's work in the United States and their financial life remained always there.<sup>356</sup> The Claimants have since 2004 filed individual federal income tax returns in the United States, while they did not do so in the Dominican Republic.<sup>357</sup> They also maintained their U.S. checking bank account since 1996, a retirement

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<sup>349</sup> Second Witness Statement of Michael Ballantine, ¶ 8; **Exhibits C-75, C-76, C-77, C-78.**

<sup>350</sup> Notice of Preliminary Objection, ¶ 15.

<sup>351</sup> Notice of Arbitration, ¶ 21; Amended Statement of Claim, ¶ 154. In this submission the address of Michael Ballantine's parents is included as the contact notice for the Claimants for the purposes of this arbitration. The Claimants never attested that this was their home address.

<sup>352</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 63.

<sup>353</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 63.

<sup>354</sup> Hearing Transcript, Day 2, 487:6-488:19 (English).

<sup>355</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 35; Procedural Order No. 25; Second Witness Statement of Michael Ballantine, ¶ 4; Hearing Transcript, Day 2, 478:3-14 (English).

<sup>356</sup> Response to the Request for Bifurcation, ¶ 34; Rejoinder on Jurisdiction and Admissibility, ¶ 70.

<sup>357</sup> Second Witness Statement of Michael Ballantine, ¶ 11; Letter from Catalano, Caboor & Co, **Exhibit C-80.**

account since 2009, U.S. health insurance cover since 2010 and separate credit cards issued in 1992 for Mr. Michael Ballantine and in 2012 for Ms. Lisa Ballantine.<sup>358</sup> Additionally, they established college savings accounts for their children's college education.<sup>359</sup> Regarding their U.S. non-profit organizations, the Claimants explain that "Filter Pure" was created in February 2008 and was directed by Ms. Lisa Ballantine until 2015.<sup>360</sup> In contrast, the "Jesus for All Nations" was managed by them while they were Dominican nationals and they raised money and filed U.S. tax returns since at least 2010.<sup>361</sup>

211. While the Claimants recognize that they used the Dominican nationality as the Respondent states, the Claimants conclude that they were still at all times dominantly U.S. citizens.<sup>362</sup> Between 2010 and 2014, the Claimants were in the United States 30 different times. Moreover, the Claimants assert that they solely used their Dominican passports when entering the Dominican Republic but they used their U.S. passports to enter elsewhere.<sup>363</sup> The Claimants reject the Respondent's count of how much time the Claimants spent in the Dominican Republic and in the United States between 2010 and 2014. The amount of days in the Dominican Republic does not compare to the Claimants' personal, cultural, familiar, and social attachment to the United States.<sup>364</sup>
212. The Claimants recognize that they built a house to promote their development and they lived there while they were in the Dominican Republic. However, the Claimants decided to put their home for sale in September 2012, to reduce the amount of time they were spending in the Dominican Republic.<sup>365</sup>
213. The Claimants also resort to the educational paths taken by each of their four children to show the dominant connection between the Claimants and the United States. All of the Claimants' children attended college in the United States, even though at the time the Claimants were living in the Dominican Republic. Furthermore, while their youngest children attended school in the

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<sup>358</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 70; Second Witness Statement of Michael Ballantine, ¶¶ 12-15; Chase Account Confirmation for Account #1110017084988, **Exhibit C-81**; Ameritrade Account Statements, **Exhibit C-82**.

<sup>359</sup> Second Witness Statement of Michael Ballantine, ¶ 16.

<sup>360</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 70; Filter Pure Inc., Articles of Incorporation (February 26, 2008), **Exhibit C-83**.

<sup>361</sup> Response to the Request for Bifurcation, ¶ 34; Jesus For All Nations, Tax Return (2010), **Exhibit C-84**.

<sup>362</sup> *See supra* ¶ 199.

<sup>363</sup> Second Witness Statement of Michael Ballantine, ¶¶ 21-23; Hearing Transcript, Day 2, 481:10-14 (English).

<sup>364</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 50.

<sup>365</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 45.

Dominican Republic, said school was supported by a U.S. non-profit institution. The students were taught in English by U.S. citizens.<sup>366</sup>

214. The Claimants argue that they also attended an American church in Jarabacoa, which was on the campus of the Caribbean Mountain Academy, a Christian reform high school, attended exclusively by U.S. students and where instruction was provided exclusively by U.S. teachers. The church services were conducted in English.<sup>367</sup>
215. The Claimants rely on the testimony of their American friends and colleagues in the Dominican Republic, to confirm their strong and continuing connection to the American community in and around Jarabacoa. In their testimonies, they confirm that the Claimants referred to Chicago as their “*home*” and that they almost exclusively socialized with Americans.<sup>368</sup> In their communications with friends, the Claimants stated how they wanted to leave the Dominican Republic or how they felt like outsiders there.<sup>369</sup>
216. The Claimants admit that they voted on the 2012 Dominican election. However, they also voted on the 2008 U.S. Presidential election and the 2014 midterm U.S. elections, while residing in the Dominican Republic.<sup>370</sup>
217. The Claimants assert that despite Ms. Lisa Ballantine’s and Ms. Tobi Ballantine’s social media postings quoted by the Respondent, they considered themselves U.S. citizens. The postings have been taken out of context, especially Ms. Tobi Ballantine’s, which are casual, flippant or sarcastic. In any case, the Claimants wonder how her youngest daughter social media postings are relevant to determining their dominant and effective nationality.<sup>371</sup> Regarding Ms. Lisa Ballantine’s Facebook postings, the Claimants complain that the Respondent only submitted the ones she refers to the Dominican Republic, while ignoring the many others in which she talks about the United States as her home or her connection to it. Although the Claimants do not consider these social media postings relevant, they refer to several between 2010 and 2014 that show her connection to the United States.<sup>372</sup>

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<sup>366</sup> Response to the Request for Bifurcation, ¶ 41; Reply Memorial, ¶ 42; Second Witness Statement of Michael Ballantine, ¶ 24.

<sup>367</sup> Second Witness Statement of Michael Ballantine, ¶¶ 18-19; Witness Statements of Scott Taylor and of Jeffrey Schumacher.

<sup>368</sup> Reply Memorial, ¶¶ 46-47; Rejoinder on Jurisdiction and Admissibility, ¶¶ 36, 52.

<sup>369</sup> Email from Michael Ballantine (January 29, 2012), **Exhibit C-163**; Email from L. Ballantine (November 19, 2013), **Exhibit C-164**; Email from L. Ballantine (November 29, 2013), **Exhibit C-165**; Email from Michael Ballantine (August 11, 2014), **Exhibit C-166**.

<sup>370</sup> Second Witness Statement of Michael Ballantine, ¶ 26; Hearing Transcript, Day 1, 63:6-8 (English).

<sup>371</sup> Reply Memorial, ¶¶ 50-53; Hearing Transcript, Day 1, 72:23-73:16 (English).

<sup>372</sup> Reply Memorial, ¶¶ 56-57; Second Witness Statement of Lisa Ballantine, ¶¶ 8-9.

218. The Claimants consider themselves foreign investors in the Dominican Republic and dominantly U.S. citizens. And equally important, the Respondent also considered them to be foreign investors and dominantly U.S. citizens.<sup>373</sup> The Claimants explain that the dominant and effective nationality rule contained in the DR-CAFTA is a codification of the existing rule of customary international law on effective nationality for dual nationals in the context of diplomatic protection.<sup>374</sup> The test of dominant and effective nationality was created to prevent “treaty shopping” and looking for diplomatic protection from a stronger state, while there is no genuine link of nationality between the individual and the state.<sup>375</sup>
219. The Claimants recall certain moments in which they were considered foreigners. In 2010, shortly after becoming naturalized Dominican citizens, the Claimants commenced the proceedings to have Jamaca de Dios registered as a foreign investment under the Dominican Foreign Investment Law 16-95. Although they did not proceed with the application, the registration would have allowed to submit the Jamaca de Dios’ profits to the United States.<sup>376</sup> In May 2013, Mr. Rodríguez, the Executive Director of the CEI-RD, considered the Claimants to be foreign investors and attempted to intervene on their behalf before the MMA.<sup>377</sup> In July 2013, Mr. Michael Ballantine became an associate member of the American Chamber of Commerce in the Dominican Republic.<sup>378</sup> On the same month, the Claimants met with U.S. Embassy officials to seek assistance in their appeal against the decision on the permit.<sup>379</sup> The U.S. Embassy wrote to the MMA on behalf of the Claimants, as they were allegedly considered predominantly U.S. citizens. In May 2014, Mr. Rodríguez wrote to the American Chamber of Commerce, confirming the Dominican government’s view that the Claimants were foreign investors.<sup>380</sup>
220. The Claimants contend that if the U.S. officials had viewed the Claimants as dominantly and effectively Dominicans, they would not have advocated for them. It would make no sense for U.S.

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<sup>373</sup> Response to the Request for Bifurcation, ¶ 45; Rejoinder on Jurisdiction and Admissibility, ¶ 78.

<sup>374</sup> Kenneth J. Vandeveld, *U.S. International Investment Agreements*, p. 144; Kenneth Vandeveld, “A Comparison of the 2004 and 1994 US Model BITs” (2009), YIILP 2008-2009, p. 294.

<sup>375</sup> Reply Memorial, ¶¶ 60-62; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), Judgment, (February 5, 1970), ICJ Rep. 1970, Separate opinion of Judge Jessup, ¶ 48; *Administrative Decision No. V*, United States-German Mixed Claims Commission, (October 31, 1924), 7 UNRIAA 141 (“any other rule would open wide the door for abuses and might result in converting a strong nation into a claims agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims”).

<sup>376</sup> Second Witness Statement of Michael Ballantine, ¶ 28.

<sup>377</sup> Letter from Jean Alain Rodríguez to Bautista Rojas Gómez (July 1, 2013), **Exhibit C-26**.

<sup>378</sup> Letter from William M. Malamud to Michael Ballantine (July 24, 2013), **Exhibit C-85**.

<sup>379</sup> Letter from Kristina Dunne to Zoila Gonzalez de Gutiérrez (August 22, 2013), **Exhibit C-59**.

<sup>380</sup> Letter from Jean Alain Rodríguez to William M. Malamud (June 17, 2014), **Exhibit C-86**.

officials to advocate for Dominican investors before the Dominican government.<sup>381</sup> The Claimants also refer to all the instances in which they were treated differently compared to Dominican-owned projects, to argue that even the Dominican officials viewed them as U.S. citizens and not Dominicans.<sup>382</sup>

221. In September 2016, the Claimants allegedly began to take steps to renounce their Dominican citizenship.<sup>383</sup> According to the Claimants, if they had known that their expansion permits would be denied, they would never have acquired dual citizenship.<sup>384</sup> They claim not to have any familiar, cultural or economic ties with the Dominican Republic, apart from their investment.<sup>385</sup>

### C. THE UNITED STATES OF AMERICA'S NON-DISPUTING PARTY SUBMISSION

222. The United States cites DR-CAFTA Articles 10.16 and 10.28 to explain who is considered a claimant and an investor and when a claim is deemed to be submitted to arbitration under the DR-CAFTA. Accordingly, if the investor is a natural person and holds at the time of submitting the claim as the dominant and effective nationality the one of the respondent State, then the investor would not be considered at that time a party to the dispute. Thus, the investor must be from another Contracting Party at the time of the alleged breach, in order for a breach under Chapter 10, Section A to arise.<sup>386</sup>

223. Relying on the doctrine of the continuous nationality, if the investor does not have a different nationality than the host State's at the relevant time, the respondent State will not be considered to have consented to the submission of a claim to arbitration and the tribunal will lack jurisdiction *ab initio* under Article 10.7.<sup>387</sup>

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<sup>381</sup> Reply Memorial, ¶ 64.

<sup>382</sup> Reply Memorial, ¶ 68; Rejoinder on Jurisdiction and Admissibility, ¶ 78.

<sup>383</sup> First Witness Statement of Michael Ballantine, ¶ 91.

<sup>384</sup> Second Witness Statement of Michael Ballantine, ¶ 1.

<sup>385</sup> Reply Memorial, ¶ 16.

<sup>386</sup> Submission of the United States, ¶¶ 3-4.

<sup>387</sup> *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 225 (June 26, 2003), **Exhibit CLA-63**; Jennings & Watts, *Oppenheim's International Law* 512-13 (9th ed. 1992).

## VI. THE OBJECTIONS TO ADMISSIBILITY

224. The Respondent objects to the admissibility of several claims because the documentation produced as a result of Procedural Order No. 5 shows that the Claimants knew in September 2010 about the creation of the National Park and the restrictions it would impose on Jamaca de Dios. Therefore, the Respondent considers the claims of violation of DR-CAFTA Articles 10.7, 10.5, 10.3 and 10.4 inadmissible, on the basis of the restrictions imposed by the National Park, since they would fall outside the three-year limitation period established by Article 10.18.1.<sup>388</sup>
225. The Claimants argue that the Respondent is omitting key information of the e-mail exchange in September 2010, specifically that ecotourism was allowed within the National Park. The Claimants considered their project to be ecotourism and they were told that it was allowed within the protected area of the National Park. Additionally, the Claimants argue that the creation of the National Park was never mentioned in the denial of permits, until the fourth one on January 2014. Thus, until January 2014 they never had knowledge of having suffered a loss.<sup>389</sup>

### A. THE RESPONDENT'S ARGUMENTS

226. The Respondent argues that this is an admissibility claim because it affects the claim itself, instead of the ability of the tribunal to hear the case.<sup>390</sup> Since the objection is not one of jurisdiction, it is not governed by Article 23(2) of the UNCITRAL Rules.<sup>391</sup>
227. As a result, the Respondent contends its objection is timely because
- (i) it was raised as soon as practicable after the evidence and facts underlying the objection came to light, and
  - (ii) it is in any event an objection of admissibility rather than jurisdiction, and therefore not subject to Article 23(2) of the UNCITRAL Rules.<sup>392</sup>
228. However, if the Tribunal would consider it a jurisdictional objection, the Respondent argues that it should still be admitted because it was submitted as soon as practicable, after the Respondent became aware of the evidence and facts underlying the objection. The Respondent only acquired the e-mail exchange on August 2, 2017, after it had submitted its Statement of Defense. Therefore,

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<sup>388</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 109-110.

<sup>389</sup> Reply Memorial, ¶¶ 190-192.

<sup>390</sup> Objection to Admissibility, ¶ 9; *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (September 24, 2008), ¶ 63, **Exhibit RLA-88**; *Abaclat, et al. v. Republic of Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (August 4, 2011), ¶ 247(i), **Exhibit RLA-89**; *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶¶ 72-73, **Exhibit CLA-30**; *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (December 19, 2013), ¶¶ 627-628, **Exhibit CLA-26**.

<sup>391</sup> Objection to Admissibility, ¶ 10.

<sup>392</sup> Objection to Admissibility, ¶ 12.



the exception in Article 23(2) of the UNCITRAL Rules should apply. The Respondent relies on a leading commentary of the UNCITRAL Rules and arbitral jurisprudence to explain that late pleas due to the discovery of new evidence fall under the definition of “justifiably late pleas” under UNCITRAL Rules Article 23(2).<sup>393</sup> Additionally, the Respondent argues that admission of the objection would not cause any prejudice to the Claimants, as they would have ample opportunity to respond.

229. Finally, the Respondent reminds the Tribunal that it has an *ex officio* obligation to ascertain that the claims are admissible and within its jurisdiction. The Tribunal’s power under UNCITRAL Rules Article 23(2) allows it to establish its own jurisdiction, deciding which issues can be addressed before it and which cannot, while giving the Parties a fair and sufficient opportunity to put forth their cases.<sup>394</sup>
230. In their witness statements, Mr. Michael Ballantine and Ms. Leslie Gil Peña stated that he first learned of the creation of the National Park on September 13, 2013, and about the restrictions imposed on Project 3 lands on January 15, 2014.<sup>395</sup> However, two sets of produced documents show that in fact both knew about the National Park much earlier.<sup>396</sup>
231. According to the Respondent, these documents show that the Claimants as of September 29, 2010, at the latest, were aware of: (i) the creation of the Baiguat National Park; (ii) the fact that Project 3 was within the National Park; (iii) the restrictions imposed by the National Park on the lands within it; and (iv) the effects of the latter on Project 3.<sup>397</sup>
232. On September 22, 2010, Ms. Arcia informed Mr. Ballantine by e-mail that lots 67 and 90 of Jamaca de Dios were within the National Park, through the submission of a map.<sup>398</sup> The map also shows that the area where the Claimants were hoping to develop Project 3 was within the National Park’s boundaries. Ms. Arcia also explained that the use of lands was restricted to “*scientific*

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<sup>393</sup> David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Second Edition), Oxford University Press (2013), p. 456, **Exhibit RLA-91**; *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction (June 4, 2014), ¶ 115, **Exhibit RLA-92**.

<sup>394</sup> Objection to Admissibility, ¶ 17; Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International (2017), UNCITRAL Arbitration Rules, Section III, Article 23, ¶¶ 2, 4, 11, 19, **Exhibit RLA-95**.

<sup>395</sup> First Witness Statement of Michael Ballantine, ¶¶ 66-67; Witness Statement of Leslie Gil Peña, ¶ 39.

<sup>396</sup> Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (September 22, 2010), pp. 1–2, **Exhibit R-170**; Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (September 22–29, 2010), pp. 1–2, **Exhibit R-169**.

<sup>397</sup> Objection to Admissibility, ¶ 24.

<sup>398</sup> Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (September 22, 2010), pp. 1–2, **Exhibit R-170**.

*research, education, recreation, nature tourism, ecotourism*”, pursuant to the law on protected areas.<sup>399</sup>

233. On the same day, Mr. Michael Ballantine acknowledged the existence of the Baiguante National Park and asked whether this was pursuant to the Environmental Law. The next day, Ms. Arcia replied that the boundaries had been created by the National Park Decree.<sup>400</sup>

234. On September 29, 2010, Mr. Mario Mendez confirmed that the land use was restricted. He stated that low impact ecotourism projects such as the Claimants’, would be allowed, but the roads, and management of sewage and other waste would have to be discussed.<sup>401</sup> Thus, Mr. Michael Ballantine had been warned that it was uncertain whether the construction of roads and the waste management facilities would be allowed within the National Park. Notwithstanding the previous e-mail exchange, the Claimants proceeded with the construction of a high-impact luxury complex.<sup>402</sup>

235. DR-CAFTA Article 10.18.1 states that

[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.<sup>403</sup>

236. The Respondent holds that to decide whether the claims submitted to arbitration are within the time limit, the Tribunal must determine (a) the date on which the Claimants first acquired actual or constructive knowledge of the alleged breach; and, (b) the date on which the Claimants first acquired actual or constructive knowledge of the damages caused by such breach. According to the Respondent, if either one of the two dates is more than three years before the date on which the claims were submitted to arbitration, they will be time-barred.<sup>404</sup>

237. The Claimants’ claims for expropriation, breach of fair and equitable treatment, breach of obligation of national treatment and most-favored-nation treatment were all based on the creation of the Baiguante National Park.<sup>405</sup> Furthermore, they were all submitted on September 11, 2014,

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<sup>399</sup> Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (September 22, 2010), p. 1, **Exhibit R-170**.

<sup>400</sup> Emails between Michael Ballantine, Mario Méndez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (September 22-29, 2010), p. 2, **Exhibit R-169**.

<sup>401</sup> Emails between Michael Ballantine, Mario Méndez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (September 22-29, 2010), p. 1, **Exhibit R-169**.

<sup>402</sup> Objection to Admissibility, ¶ 32.

<sup>403</sup> DR-CAFTA, Article 10.18.1, **Exhibit R-10**.

<sup>404</sup> Objection to Admissibility, ¶ 35.

<sup>405</sup> Objection to Admissibility, ¶¶ 37-39.

pursuant to the Notice of Arbitration of the same date. Thus, since the e-mail exchange shows that the Claimants already had knowledge on September 2010, the claims are time-barred and dismissed.<sup>406</sup>

238. DR-CAFTA Article 10.18.1 envisages two types of knowledge of breach and loss or damage: (a) actual knowledge, which would be what the Claimants did in fact know at a given time; and, (b) constructive knowledge, which is what they should have known at a given time. The Claimants have to acquire either one of the two.<sup>407</sup>
239. Two decision under the North American Free Trade Agreement (“NAFTA”) have addressed the implications of the terms “knowledge of the breach”. For the *UPS v. Canada* tribunal, the relevant question is “when [claimant] first had or should have had notice of the existence of conduct alleged to breach NAFTA obligations and of the losses flowing from it.”<sup>408</sup> (emphasis added by the Respondent) The tribunal in *Grand River* held that its task was to decide if the record showed that the claimant had knowledge “of the measures complained of as breaches of relevant Articles of NAFTA.”<sup>409</sup> (emphasis added by the Respondent) The Claimants conclude that the relevant question is actually if and at what point the claimant became aware of the measure itself, instead of, if and at what point it became aware that that the measure would constitute a treaty breach.<sup>410</sup>
240. In the present case, the e-mail exchange shows that as of September 29, 2010, the Claimants knew of the creation of the Baiguate National Park, its restrictions and their effects on Project 3 lands. Thus, they knew of the measure that allegedly breached the DR-CAFTA.
241. In the DR-CAFTA case *Spence v. Costa Rica*, the tribunal held that the constructive knowledge test is an objective standard.<sup>411</sup> Previous tribunals have confirmed that constructive knowledge “entails notice that is imputed to a person, either from knowing something that ought to have put

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<sup>406</sup> Objection to Admissibility, ¶ 36; Rejoinder on Jurisdiction and Merits, ¶ 110.

<sup>407</sup> Objection to Admissibility, ¶ 41; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016), ¶ 217, **Exhibit RLA-52**.

<sup>408</sup> *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits (May 24, 2007), ¶ 28, **Exhibit CLA-15**.

<sup>409</sup> *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006), ¶ 60, **Exhibit RLA-99**.

<sup>410</sup> Objection to Admissibility, ¶ 44; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006), ¶ 83, **Exhibit RLA-99**.

<sup>411</sup> *Spence International Investments, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (May 30, 2017), ¶ 209, **Exhibit RLA-3**.

*the person to further enquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge”.*<sup>412</sup>

242. Accordingly, since the creation of the National Park would impose restrictions on Project 3 lands, the Claimants as prudent investors, should have known on September 29, 2010 the underlying facts on which they based their claims of expropriation, breach of national treatment and most-favored-nation treatment, and fair and equitable treatment.<sup>413</sup>
243. Particular knowledge of the treaty rights is not deemed relevant in order to assess the existence of actual or constructive knowledge.<sup>414</sup> However, even if it was required, the Respondent explains that as of September 2010, it had for several years been conducting a solid media campaign for the civil society and the business community about DR-CAFTA and its investment chapter.<sup>415</sup> Furthermore, the Claimants had legal counsel advising them, on their investment in Jamaca de Dios on September 2010. Thus, they should have known of the relevant treaty rights and the alleged breach thereof, by September 29, 2010, at the latest.<sup>416</sup>
244. The Respondent contends that by September 2010, the Claimants had actual knowledge of the restrictions imposed by the National Park and actual knowledge of the purported damage or loss incurred as a result thereof.<sup>417</sup>

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<sup>412</sup> *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006), ¶ 59, **Exhibit RLA-99**.

<sup>413</sup> Objection to Admissibility, ¶¶ 47-49.

<sup>414</sup> *UPS v. Canada*, (NAFTA), UNCITRAL, Merits Award (May 24, 2007), ¶ 28, **Exhibit CLA-15**; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006), ¶ 60, **Exhibit RLA-99**.

<sup>415</sup> *Rep. Dominicana firma el CAFTA*, BBC Mundo (August 6, 2004), **Exhibit R-174**; Q&A: The CAFTA Debate, The New York Times (July 18, 2005), **Exhibit R-175**; Debating the Central American Free Trade Act, PBS (November 3, 2005) **Exhibit R-176**; *Los ejes de la política comercial dominicana*, Listín Diario (July 2, 2007) **Exhibit R-177**; *Plan de Difusión/Comunicación del DR CAFTA*, Dirección de Comercio Exterior de la República Dominicana (December 2007–November 2009), **Exhibit R-178**; *Comercio Internacional DR CAFTA: Compromisos y Oportunidades*, Secretaría de Estado de Industria y Comercio, Dirección de Comercio Exterior y Administración de Tratados Comerciales, Consejo Nacional de Competitividad (August 27, 2009), **Exhibit R-179**; *DR-CAFTA Tres Años de Compromisos y Logros*, Ministerio de Industria y de Comercio de la República Dominicana (2010), pp. 83–84, **Exhibit R-180**; *Estrategia De Comunicación Para El DR-CAFTA*, Dirección de Comercio Exterior de la República Dominicana (2006), **Exhibit R-181**; *Inversión Bajo el DR-CAFTA*, Secretaría de Estado de Industria y Comercio (July 17–18, 2007), **Exhibit R-182**; *El Arbitraje de Inversión y la Defensa del Estado en R.D.*, Secretaría de Estado de Industria y Comercio (September 11–12, 2008), **Exhibit R-183**; *La Solución de Controversias en el DR-CAFTA*, Instituto de Comercio Exterior e Innovación Empresarial (I-CEi) (October 8, 2009), **Exhibit R-184**; *Seminario Avanzado de Capacitación Sobre Administración de Tratados de Libre Comercio: Las Controversias en Materia de Inversión*, Organization of American States, United Nations Commission on Trade and Development, Secretaría de Estado de Industria y Comercio, Centro de Exportación e Inversión de la República Dominicana, Agencia Canadiense de Desarrollo Internacional (May 18–19, 2007), **Exhibit R-185**.

<sup>416</sup> Objection to Admissibility, ¶ 50.

<sup>417</sup> Objection to Admissibility, ¶ 51.

245. In order to comply with the “knowledge of the loss or damage” requirement, the Claimants do not need to have known the exact amount of injury or loss suffered but just that some was caused.<sup>418</sup> As another DR-CAFTA tribunal held, “[i]t is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.”<sup>419</sup>
246. Since the Claimants have argued that the restrictions imposed by the creation of the National Park deprived them of “*significant commercial value*” and “*reasonable commercial use*”, they should have been able to appreciate this loss or damage on September 29, 2010, at the latest.<sup>420</sup>
247. As a result, the Claimants’ expropriation, fair and equitable treatment, national treatment, and most-favored-treatment claims based on the creation of the Baiguate National Park and the restrictions it imposed, fall outside the time limit pursuant to DR-CAFTA Article 10.18.1 and are therefore inadmissible.<sup>421</sup>
248. According to the Respondent, in their Admissibility Response, the Claimants argue that first, they have not based any claim in the creation of the Baiguate National Park and second, that any such claim would suffer from conceptual flaws.<sup>422</sup> The Respondent denies the first part, and points out to several paragraphs in the Amended Statement of Claim which evidence otherwise.<sup>423</sup> The Respondent interprets thereof that the Claimants abandon these claims and assumes so.
249. However, if the Claimants raise these claims again, the Respondent states that it does not accept their legal, procedural or factual arguments on the issue of admissibility or the merits underlying these claims, and that unless otherwise stated, nothing in its Rejoinder should be construed as acceptance thereof.<sup>424</sup>

## **B. THE CLAIMANTS’ ARGUMENTS**

250. The Claimants rely on two DR-CAFTA cases, one of which against the Dominican Republic, in which the respondent States argued that the tribunal lacked jurisdiction over the case because the

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<sup>418</sup> *Corona*, ¶ 194, **Exhibit RLA-52**; *Spence*, ¶ 213, **Exhibit RLA-3**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 87; **Exhibit CLA-23**.

<sup>419</sup> *Spence*, ¶ 213, **Exhibit RLA-3**.

<sup>420</sup> Objection to Admissibility, ¶ 53; Amended Statement of Claim, ¶¶ 14, 119.

<sup>421</sup> Objection to Admissibility, ¶ 54.

<sup>422</sup> Rejoinder on Jurisdiction and Merits, ¶ 111; Response to the Objection to Admissibility, ¶¶ 2, 14, 72-73, 76, 79.

<sup>423</sup> Amended Statement of Claim, ¶¶ 13-14, 116-117, 120; Reply Memorial, ¶¶ 200, 205, 252, 289, 332, 357.

<sup>424</sup> Rejoinder on Jurisdiction and Merits, ¶ 112.

claims were time-barred pursuant to Article 10.18.1.<sup>425</sup> Even NAFTA tribunals have always considered the question as one of jurisdiction, not admissibility.<sup>426</sup>

251. Accordingly, the Claimants argue that the Respondent's objections are jurisdictional and thus, time-barred.<sup>427</sup> A leading commentary of the UNCITRAL Rules contends that untimely jurisdictional objections can only be admitted in very rare circumstances.<sup>428</sup>
252. The Claimants recognize that the Respondent did not have this evidence when it filed its Statement of Defense. Nevertheless, it does not add anything new to the Respondent's knowledge because, pursuant to Article 10.18.1, the Claimants only have to show when they acquired or should have first acquired knowledge of the breach and of the loss or damage. The Claimants argue that along its Statement of Defense, the Respondent contends that the Claimants should have known by 2009 that the Baiguate National Park would be created. As a result, there is no such situation of grave injustice because the e-mail exchange does not show that Mr. Michael Ballantine knew of a breach or of a loss or damage.<sup>429</sup>
253. As a result, the Respondent cannot claim that the e-mail exchange provided information that it did not have before for the purposes of an objection under DR-CAFTA Article 10.18.1. The Respondent had enough information to make such an objection earlier. Simply having new evidence is not sufficient to grant this late jurisdictional objection.<sup>430</sup> Therefore, the Claimants argue that they are not responsible for the Respondent's late objection.<sup>431</sup>
254. The Claimants contend that the Respondent must show that the Claimants had knowledge of the breach and of the loss, and not either one of them.<sup>432</sup> Thus, the relevant date is shifted further to the one in which the Claimants – both of them – had knowledge of the breach and the loss or damage.

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<sup>425</sup> *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016), ¶¶ 4, 54, 280, **Exhibit RLA-52**; *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016), ¶¶ 7, 27, 162, **Exhibit RLA-3**.

<sup>426</sup> *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (June 14, 2013), ¶ 257.

<sup>427</sup> Admissibility Response, ¶¶ 15, 107.

<sup>428</sup> Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International (2017), p. 197.

<sup>429</sup> Admissibility Response, ¶¶ 97-99, 104, **Exhibit RLA-95**.

<sup>430</sup> Admissibility Response, ¶¶ 105-107. The Claimants reject the Respondent's reliance on *European American Investment Bank*, **Exhibit RLA-92**, because that case dealt with different facts, in which the investor's conduct was responsible for the admission of the objection.

<sup>431</sup> Admissibility Response, ¶¶ 100-103.

<sup>432</sup> Admissibility Response, ¶¶ 69-70; *Corona* ¶ 194, **Exhibit RLA-52**.

255. According to the Claimants, the e-mail exchange in September 2010, between Mr. Michael Ballantine and the Empaca Redes consultants did not amount to the required knowledge of a breach – much less for Ms. Lisa Ballantine who was not even copied on the e-mails – because: (i) the e-mail explained that in the National Park ecotourism was allowed and the Claimants’ Phase 2 was considered as such; (ii) other projects were freely developing in category II national parks, some even in the Baiguata National Park; (iii) the possibility that the National Park would be an impediment to develop Jamaca de Dios was not raised by the Respondent until September 2015; (iv) the three denials of the permit did not mention the National Park or the restrictions imposed by it; and (v) CONFOTUR approved Phase 2 after Mr. Michael Ballantine learned about the National Park.<sup>433</sup>
256. Therefore, the Claimants argue that the Respondent did not breach DR-CAFTA obligations because it had not used the National Park as a basis to deny the Claimants’ permit, nor had it imposed restrictions on their development based on the National Park, until September 2013. Although the Claimants consider the manner in which the project was created discriminatory, since Dominican-owned projects were excluded, they recognize that the drawing of the National Park’s boundaries is not a breach by itself.<sup>434</sup>
257. Additionally, the Claimants contend that the e-mail exchange in September 2010 did not amount to knowledge of having suffered loss or damage at that point in time. The Respondent cannot argue that the Claimants suffered any loss in September 2010 because (i) the Claimants had been reassured by their environmental consultants that the National Park allowed ecotourism and the Phase 2 expansion was such; (ii) the Claimants could see other land owners developing in national parks; (iii) the National Park was not used to deny the permit or to impose restrictions on Jamaca de Dios until 2014.<sup>435</sup> In fact, the Respondent does not deny that ecotourism is allowed within the National Park because its Management Plan made on 2017 allows for it.<sup>436</sup>
258. The Claimants argue that having knowledge of an offending measure is not the same as having knowledge of a breach, or of loss or damage, as was raised in the *Spence v. Costa Rica* case.<sup>437</sup> The tribunal held that “[w]hile the Claimants’ knowledge at the time of purchase may be material for purposes of any assessment of the value of the properties in question, it is not ultimately

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<sup>433</sup> Admissibility Response, ¶ 71.

<sup>434</sup> Admissibility Response, ¶ 72.

<sup>435</sup> Admissibility Response, ¶ 76.

<sup>436</sup> Resolution No. 0010-2017, *Plan de Manejo del Parque Nacional Baiguata* (March 20, 2017), with *Plan de Manejo Parque Nacional Baiguata*, **Exhibit R-84**.

<sup>437</sup> *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016), ¶ 149, **Exhibit RLA-3**.

*determinative either of issues of jurisdiction or of liability*”.<sup>438</sup> (emphasis added by the Claimants)

The *Spence* tribunal held, same as the *Corona* tribunal, that the relevant date is when the claimant first acquired knowledge of the breach and of the loss or damage as a result thereof.<sup>439</sup> In this case, the Claimants argue that they would not have had a basis to know in September 2010 that they might be subject to expropriation and other significant restrictions. Even if they had known, it would still not raise the time bar.

259. Other tribunals have held that measures that take place before the time bar limit commences, can be relevant for purposes of merits, even if they do not start the time bar clock.<sup>440</sup> In this case, the Claimants bring to the attention of the Tribunal the discriminatory circumstances surrounding the creation of the National Park, which only arose in 2014, when the permit was denied based on them.<sup>441</sup>
260. Regarding the Respondent’s interpretation that the Claimants have abandoned their claims, the Claimants explain that they argued that the creation of the National Park did not give rise to a claim by itself because there was no indication that the National Park would prohibit the development.<sup>442</sup> If a person does not notice that it has suffered a loss, then the claim has not yet arisen. Therefore, the Claimants did not abandon their claims, but they simply did not have them until the permit was denied on the basis of the National Park.<sup>443</sup>

## C. NON-DISPUTING PARTIES’ SUBMISSIONS

### 1. Costa Rica

261. Costa Rica, as non-disputing Party in these arbitration proceedings analyzes the statute of limitations under DR-CAFTA Article 10.18. The tribunal’s jurisdiction is derived from the consent of the parties to arbitration. Article 10.18 sets out a series of conditions and limitations on consent. The statute of limitations as a provision reinforces legal certainty by requiring

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<sup>438</sup> *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016), ¶ 205, **Exhibit RLA-3**.

<sup>439</sup> *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016), ¶ 211, **Exhibit RLA-3**.

<sup>440</sup> *Eli Lilly and Company v Canada*, ICSID Case No. UNCT/14/2, Final Award (March 16, 2017), ¶ 172, **Exhibit RLA-45**.

<sup>441</sup> Admissibility Response, ¶ 87.

<sup>442</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 88.

<sup>443</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 89.



“diligent prosecution of known claims and insuring that claims will be resolved when evidence is reasonably available and fresh, therefore to protect the potential debtor from late actions”.<sup>444</sup>

262. DR-CAFTA Article 10.18.1 sets out a relevant question for the tribunal: “What is the date on which the claimant first acquired knowledge of the breach that is being alleged?”<sup>445</sup> (Emphasis in original) There are two alternatives to answer this question: (i) determining the date on which the claimant first acquired knowledge of the alleged breach; or, (ii) determining the date on which the claimant should have first acquired knowledge of the alleged breach. For the first alternative there is enough evidence to identify the specific moment in which the knowledge was first acquired. For the second alternative, the focus is on a set of circumstances surrounding the claimant that should have allowed it to acquire knowledge of the alleged breach. The facts must have been evident, made public and notorious, or there must have been a situation in which it was the claimant’s duty and responsibility to know them.<sup>446</sup>
263. According to Costa Rica, the two alternatives provide the Tribunal with a range of possibilities to draw a line on its jurisdiction regarding *ratione temporis*.<sup>447</sup>

## 2. United States of America

264. According to the United States, a tribunal must find that a claim satisfies the requirements set out in Article 10.18.1 to establish the Contracting Party’s consent to the claim. Thus, there is a *ratione temporis* jurisdictional limitation on the tribunal’s authority to act on the merits of a dispute in this Article.<sup>448</sup> And since the claimant bears the burden of proof, it has to demonstrate the necessary and relevant facts to prove that the claims fall within the three-year limitations period.<sup>449</sup>

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<sup>444</sup> *Vanessa Ventures Ltd v. Bolivian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/06, Decision on Jurisdiction (August 22, 2008), ¶ 31.

<sup>445</sup> Submission of Costa Rica, ¶ 7.

<sup>446</sup> Submission of Costa Rica, ¶¶ 8-9; *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (May 30, 2017), ¶ 209.

<sup>447</sup> Submission of Costa Rica, ¶ 10.

<sup>448</sup> *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016), ¶ 280, **Exhibit RLA-52**; *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/UNCITRAL, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016), ¶¶ 235-236, **Exhibit RLA-3**; *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, (January 30, 2018), ¶¶ 82-83; *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (June 14, 2013), ¶¶ 314, 335; *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) (May 31, 2005), ¶ 18.

<sup>449</sup> *Spence*, Interim Award ¶¶ 163, 239, 245-246.

265. The limitation period is “*clear and rigid*” and it is not subject to any suspension, prolongation or other qualification.<sup>450</sup> An investor or enterprise will first acquire knowledge of an alleged breach or loss or damage at a particular moment in time that would be the relevant date under Article 10.18.1. The operative date will be the date on which the claimant first acquired actual or constructive knowledge of sufficient facts to make the claim under the Article.<sup>451</sup> Regarding the incurred “loss or damage” under Article 10.18.1, an investor may have knowledge of it even if the financial impact of that loss or damage is not immediate, as the *Grand River* tribunal held.<sup>452</sup>

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<sup>450</sup> *Grand River Enterprises Six National, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006), ¶ 29, **Exhibit RLA-99**; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), ¶ 63, **Exhibit CLA-5**.

<sup>451</sup> Submission of United States, ¶¶ 9-10.

<sup>452</sup> *Grand River Enterprises Six National, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006), ¶ 77, **Exhibit RLA-99**.

## VII. MERITS

### A. THE RELATION UNDER DR-CAFTA BETWEEN THE RESPONDENT'S ENVIRONMENTAL PROTECTION OBLIGATIONS AND ITS INVESTMENT PROTECTION OBLIGATIONS

#### 1. The Respondent's Arguments

266. The Respondent states that protection and conservation of the environment are important considerations under DR-CAFTA.<sup>453</sup> Its Chapters 10 and 17 establish certain environmental obligations for the Contracting Parties. In particular, DR-CAFTA Article 10.11 provides that

[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.<sup>454</sup>

267. According to this provision, the Contracting Parties preserve their right to apply their environmental policies without breaching their substantive obligations, notwithstanding the protections offered to investments under Chapter 10.<sup>455</sup> Thus, the Respondent emphasizes that protection of the environment and promotion of open trade should be reconciled and be made mutually supportive.<sup>456</sup>

268. The Respondent compares NAFTA Article 1114 with CAFTA Article 10.11.<sup>457</sup> NAFTA Article 1114 was interpreted to allow the adoption of regulatory measures to protect the environment without breaching investment obligations unless such measures were discriminatory.<sup>458</sup> According to the Respondent, this would apply *mutatis mutandis* to DR-CAFTA, given the parity between the two provisions.<sup>459</sup>

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<sup>453</sup> Statement of Defense, ¶¶ 87-90; Hearing Transcript, Day 5, 1313:3-14 (English).

<sup>454</sup> DR-CAFTA, Article 10.11, **Exhibit R-10**.

<sup>455</sup> Statement of Defense, ¶ 91; Beharry, Christina L., and Melinda E. Kuritzky, "Going Green: Managing the Environment Through International Investment Arbitration," 30(3) American University International Law Review 383, p. 392 (2015), **Exhibit RLA-68**.

<sup>456</sup> Statement of Defense, ¶ 92; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Partial Award (November 12, 2000), ¶ 118, **Exhibit RLA-71**.

<sup>457</sup> Statement of Defence, ¶ 93.

<sup>458</sup> Statement of Defence, ¶ 94.

<sup>459</sup> Statement of Defence, ¶ 95; *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Submission of the United States, ¶ 5, **Exhibit RLA-73**; *Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (November 3, 2015), ¶ 389, **Exhibit RLA-76**.

269. The Respondent also refers<sup>460</sup> to paragraph 4(b) of Annex 10-C to DR-CAFTA which provides that

[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.<sup>461</sup>

270. Accordingly, the Respondent holds that a high threshold applies when claiming that an environmental measure was discriminatory, and thus in breach of DR-CAFTA Chapter 10.<sup>462</sup> The Respondent summarizes the Claimants' allegations to the adoption of two measures: the Environmental Law and the National Park Decree.<sup>463</sup> The first one is a general application law establishing the environmental protection framework for the Dominican Republic, while the second one is a general application norm which created 32 protected areas, including the Baiguante National Park.<sup>464</sup> The Respondent defends the creation of the National Park as reasonable, to fulfill the Respondent's international commitments related to biodiversity and environmental protection and in reliance of Mr. Sixto Inchaustegui's Expert Report.<sup>465</sup>

271. Accordingly, the Respondent concludes that the Claimants have not met the high threshold established by DR-CAFTA, when it comes to prove that an environmental measure has resulted in a DR-CAFTA violation. Consequently, the enactment and enforcement of the Environmental Law and the National Park Decree cannot be considered DR-CAFTA violations.<sup>466</sup>

## 2. The Claimants' Arguments

272. The Claimants explain that the exception in Article 10.11 will only apply if the measures are consistent with DR-CAFTA Chapter 10. Thus, if the measures are expropriatory or violate national treatment they will still result in a DR-CAFTA violation, despite being related to environmental concerns.<sup>467</sup>

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<sup>460</sup> Statement of Defense, ¶ 96; Hearing Transcript, Day 5, 1314:1-15 (English).

<sup>461</sup> DR-CAFTA, Annex 10-C, paragraph 4(b), **Exhibit R-10**.

<sup>462</sup> Statement of Defense, ¶ 97; Hearing Transcript, Day 5, 1314:25-1315:4 (English).

<sup>463</sup> Statement of Defense, ¶ 98.

<sup>464</sup> Statement of Defense, ¶¶ 99-100; Environmental Law (August 18, 2000), **Exhibit R-3**; Decree No. 571-09, **Exhibit R-77**.

<sup>465</sup> Statement of Defense, ¶ 101; Expert Report of Inchaustegui, ¶¶ 33, 48-55; Rejoinder on Jurisdiction and Merits, ¶ 149.

<sup>466</sup> Statement of Defense, ¶ 102.

<sup>467</sup> Reply Memorial, ¶¶ 245-246.

273. In this sense, the Claimants argue that the Respondent has not applied these two measures transparently and non-discriminatorily.<sup>468</sup> The manner in which they were applied and the circumstances surrounding the creation of the National Park would be inconsistent with Chapter 10, and so the exception in DR-CAFTA Article 10.11 does not apply.<sup>469</sup>

### 3. Costa Rica's Non-disputing Party Submission

274. According to Costa Rica, DR-CAFTA addresses the Contracting Parties' common interest of the protecting of the environment, as reflected in the treaty's Preamble.<sup>470</sup> Through Article 10.11 the Contracting Parties ensure that the obligations in Chapter 10 are interpreted in conjunction with the intentions manifested in the Preamble.<sup>471</sup> As a result, Costa Rica considers that Article 10.11 allows a Contracting Party to take measures necessary to address its environmental concerns and acknowledges the host State's general prerogative to regulate and enforce environmental measures.<sup>472</sup>

275. In this sense, Costa Rica highlights the importance given by DR-CAFTA to investments and the environment, which can be appreciated when Article 10.11 is read in the context of Chapter 10, the rest of DR-CAFTA, and its implementation.<sup>473</sup>

276. Costa Rica contends that to ensure the effectiveness of a treaty's objective and purpose, tribunals need to analyze the intention of the contracting parties by looking closely into the ordinary meaning of their words in their context. In the case of DR-CAFTA Article 10.11, the host States have the right to regulate, with a special focus on environment. As a result, this clause shows that the Contracting Parties' intention was to maintain a balance between both elements.<sup>474</sup>

277. In sum, according to Costa Rica DR-CAFTA Article 10.11 reflects the Contracting Parties' determination to develop their policies on environmental protection without substantially breaching their DR-CAFTA obligations. That should be considered its point of effectiveness, in accordance with the principle of *effet utile*, which stems from the principle of good faith.<sup>475</sup> As a

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<sup>468</sup> Reply Memorial, ¶¶ 247-249.

<sup>469</sup> Reply Memorial, ¶¶ 250-252.

<sup>470</sup> Submission of Costa Rica, ¶ 32.

<sup>471</sup> Submission of Costa Rica, ¶ 33.

<sup>472</sup> Submission of Costa Rica, ¶¶ 33-34.

<sup>473</sup> Submission of Costa Rica, ¶ 35.

<sup>474</sup> Submission of Costa Rica, ¶ 36.

<sup>475</sup> Submission of Costa Rica, ¶ 37.

result, when analyzing a claim, Costa Rica considers that there should be a balance between the investment protection and the maintenance of domestic environmental policies.<sup>476</sup>

**B. WHETHER THE RESPONDENT BREACHED ARTICLES 10.3 AND 10.4 OF THE DR-CAFTA**

**1. The Claimants' Arguments**

278. The Claimants contend that the Respondent has breached its national treatment and most-favored-nation (“MFN”) obligations under the DR-CAFTA, which apply to “investors” and “investments” equally. Thus, according to the Claimants, the Respondent has an obligation to treat the investors as favorably as it treats nationals and every foreigner and another obligation to treat investments “*in the same no less favorable manner*”.<sup>477</sup>

**(a) National Treatment**

279. The Claimants explain<sup>478</sup> that the purpose of the national treatment provision is to “*ensure that a national measure does not upset the competitive relationship between domestic and foreign investors*”.<sup>479</sup> Conversely, the MFN provision establishes the duty to treat U.S. investors and investments no less favorably than investors and investments from other foreign countries.<sup>480</sup>

280. Relying on the decision by the *Pope & Talbot* tribunal,<sup>481</sup> the Claimants allege that the Respondent is obliged to provide them with the treatment equivalent to the “best” treatment accorded to the domestic investors or investments in like circumstances.<sup>482</sup> Thus, “no less favorable” treatment means comparable to the best treatment accorded to the comparator, not better nor worse.<sup>483</sup> The difference in treatment can amount to a violation of the national treatment obligation, unless it has “*a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly*

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<sup>476</sup> Submission of Costa Rica, ¶ 38.

<sup>477</sup> Amended Statement of Claim, ¶¶ 168, 171.

<sup>478</sup> Amended Statement of Claim, ¶ 172.

<sup>479</sup> *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05, Award (November 21, 2007), ¶ 199, **Exhibit CLA-6**.

<sup>480</sup> Amended Statement of Claim, ¶ 173.

<sup>481</sup> *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Phase 2 Merits Award, (April 10, 2001), ¶ 42, **Exhibit CLA-9**.

<sup>482</sup> Amended Statement of Claim, ¶ 185; Reply Memorial, ¶ 427; Hearing Transcript, Day 1, 107:7-16 (English).

<sup>483</sup> Reply Memorial, ¶ 489.

*undermine the investment liberalizing objectives of NAFTA*".<sup>484</sup> Thus, the Claimants conclude that the focus must be set on the treatment, rather than on the policy.<sup>485</sup>

281. The Claimants resort to *Cargill v. Mexico*,<sup>486</sup> which lays out the basic requirements of these obligations, as follows:

[I]t must be demonstrated first that the Claimant, as an investor, is in "like circumstances" with the investor of another Party or of a non-Party, or that the Claimant's investment is in "like circumstances" with the investment of an investor of another Party or of a non-Party. And second, it must be shown that the treatment received by Claimant was less favorable than the treatment received by the comparable investor or investment.<sup>487</sup>

282. Relying on several commentators<sup>488</sup> the Claimants state that they only have to show that one single domestic comparator received more favorable treatment.<sup>489</sup> The Parties agree on the three-part test applied to determine whether the host State breached the national treatment clause:

(1) whether the domestic investor is an appropriate comparator to the disputing investor or covered investment; (2) whether the disputing investor was in fact accorded a less favorable treatment than its domestic comparator; and (3) whether any differential treatment that may have existed was justified on the basis of legitimate policy and/or legal reasons.<sup>490</sup>

283. For the Claimants, the concept of "like circumstances" must be assessed on a case-by-case basis.<sup>491</sup> The Claimants rely on the decision by the *Pope & Talbot* tribunal,<sup>492</sup> which explained that "'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations".<sup>493</sup> The "like" examples must be the most "apt comparators where possible".<sup>494</sup> In that sense, the Claimants note<sup>495</sup> that the tribunal in *Methanex* stated that "*it would be as*

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<sup>484</sup> *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Phase 2 Merits Award, (April 10, 2001), ¶ 78, **Exhibit CLA-9**.

<sup>485</sup> Reply Memorial, ¶ 428.

<sup>486</sup> Amended Statement of Claim, ¶ 174.

<sup>487</sup> Amended Statement of Claim, ¶ 174; *Cargill, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009), ¶ 228, **Exhibit CLA-8**.

<sup>488</sup> Reply Memorial, ¶¶ 430-432; Nicholas DiMascio & Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin', 102 *Am. J. Int'l L.* 48, 89 (2008) p. 82, **Exhibit CLA-75**; M. Kinnear, A. Biorlund & J.F.G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter II* (Kluwer Law International, 2006), Article 1102 Section, p. 27, **Exhibit CLA-76**; Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer 2009), p. 181, **Exhibit CLA-57**.

<sup>489</sup> Reply Memorial, ¶¶ 430, 436, 458, 490, 493; Hearing Transcript, Day 1, 106:24-107:4 (English).

<sup>490</sup> Reply Memorial, ¶ 434; Statement of Defense, ¶ 148.

<sup>491</sup> Amended Statement of Claim, ¶ 175.

<sup>492</sup> Amended Statement of Claim, ¶ 175.

<sup>493</sup> *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Phase 2 Merits Award, (April 10, 2001), ¶ 75, **Exhibit CLA-9**.

<sup>494</sup> Amended Statement of Claim, ¶ 176.

<sup>495</sup> Amended Statement of Claim, ¶ 176; Reply Memorial, ¶ 474.

*perverse to ignore identical comparators if they were available and to use comparators that were less 'like,' as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed”.*<sup>496</sup>

284. The Claimants explain that the first step in analyzing whether the Respondent violated the DR-CAFTA provisions is to identify the comparators in “like circumstances”. There are three principal factors that must be taken into account, when identifying these comparators: (i) whether the comparators operate in the same business or economic sector; (ii) whether the comparators produce competing goods or services; and (iii) whether the comparators are subject to a comparable legal regime or requirements.<sup>497</sup>
285. Regarding the first one, the analysis “*focuses on the commercial operations of the investor, rather than the scale of operations*”.<sup>498</sup> Special attention is given to the business’ various activities, like the economics of the service offered, the customers and the logistics and internal administration of the operations.<sup>499</sup>
286. Regarding the second factor, the analysis focuses on whether the investor provides the same or competing goods or services as the proposed comparators. The Claimants rely on the *Corn Products International v. Mexico* decision to contend that “*where an investor’s product is in direct competition with that of a comparator, this factor supports a conclusion that the two entities are in ‘like circumstances’*”.<sup>500</sup>

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<sup>496</sup> *Methanex Corp. v. United States of America* (NAFTA), UNCITRAL, Final Award (August 3, 2005), Part IV, Chapter B, ¶ 17, **Exhibit CLA-11**.

<sup>497</sup> Amended Statement of Claim, ¶ 177; Reply Memorial, ¶ 437; *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Phase 2 Merits Award, (April 10, 2001), ¶ 78, **Exhibit CLA-9**; *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05, Award (November 21, 2007), ¶ 199, **Exhibit CLA-6**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA), UNCITRAL, Award (January 12, 2011), ¶ 167, **Exhibit CLA-12**; *Cargill, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009), ¶ 207, **Exhibit CLA-8**.

<sup>498</sup> Amended Statement of Claim, ¶ 178; *Pakerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007), ¶ 391, **Exhibit CLA-14**.

<sup>499</sup> Hearing Transcript, Day 1, 113:7-8 (English); *UPS v. Canada*, (NAFTA), UNCITRAL, Merits Award (May 24, 2007), ¶¶ 101-104, **Exhibit CLA-15**.

<sup>500</sup> Amended Statement of Claim, ¶ 179; *Corn Products International v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (January 15, 2008), ¶ 120, **Exhibit CLA-13**.



287. Regarding the third factor, the Claimants state that the Tribunal's analysis should be whether the Claimants and the comparator are subject to the same legal regime.<sup>501</sup> This analysis was conducted in *Grand River* (NAFTA) and *Merrill & Ring v. Canada*.<sup>502</sup>
288. According to the Claimants, the comparators fulfill the requirements under the three categories.<sup>503</sup> The Claimants claim to operate in the same sectors as the comparators – i.e. the resort/restaurant/hotel sector –, and would compete directly with them.<sup>504</sup> Moreover, their investment is under the same legal regime than the comparable businesses when it comes to the permitting requirements and national park restrictions. These comparators are Jarabacoa Mountain Garden, Mirador del Pino, Aloma Mountain, Paso Alto and Quintas del Bosque, among others.<sup>505</sup>
289. The Claimants argue that the Respondent's proposed "environmental impact" comparable factor is not a proper and relevant factor to determine the "like circumstances",<sup>506</sup> though it would be one of the factors to evaluate when considering whether comparators are in "like circumstances".<sup>507</sup> The relevant factor "must take into account the regulatory purpose of the treatment in question and who or what is affected", and "the appropriate comparator for the like circumstances analysis cannot be divorced from the reasons for the treatment in question".<sup>508</sup>
290. According to the Claimants, the Respondent's proposed factor is too narrow and too subjective.<sup>509</sup> The Claimants explain that if the Claimants' and the Dominicans' projects are compared solely on their "environmental impact" it would be unnecessarily narrow, since a broad interpretation would be preferred to fully review the measure under the national treatment clause.<sup>510</sup> Therefore, the Claimants propose the Tribunal to focus on comparing "the different projects operating in similar environmentally sensitive areas, such as developments or road projects in mountainous

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<sup>501</sup> Amended Statement of Claim, ¶ 180; Hearing Transcript, Day 1, 113:10-11 (English).

<sup>502</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA), UNCITRAL, Award (January 12, 2011), ¶¶ 165-166, **Exhibit CLA-12**; *Merrill & Ring v. Canada* (NAFTA), UNCITRAL, Award, (March 31, 2010), ¶ 89, **Exhibit CLA-16**.

<sup>503</sup> Amended Statement of Claim, ¶ 182.

<sup>504</sup> Amended Statement of Claim, ¶ 182.

<sup>505</sup> Amended Statement of Claim, ¶ 183.

<sup>506</sup> Reply Memorial, ¶ 441.

<sup>507</sup> Hearing Transcript, Day 1, 116:7-18 (English).

<sup>508</sup> Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer 2009), p. 163, **Exhibit CLA-57**.

<sup>509</sup> Reply Memorial, ¶ 442.

<sup>510</sup> Reply Memorial, ¶ 443; R. Dolzer & C. Schreuer, *Principles of International Investment Law*, (Oxford U. Press 2008), p. 180.

*areas in the DR*”, which would be completely compatible with the Respondent’s proposed factor.<sup>511</sup> (Emphasis added by the Claimants)

291. Additionally, the Claimants argue that the Respondent’s proposed comparator is too subjective because the analysis would result in dividing the projects between their positive and negative impact on the environment, a complicated exercise.<sup>512</sup> It would allow the Respondent to simply choose “*the comparators by asserting that other projects do not have the same environmental impact*”. Yet, the Respondent would not be a neutral observer and its negative assessment of the Claimants’ project’s environmental impact should “*not be taken at face value*”.<sup>513</sup>

292. Nevertheless, if the Tribunal were to use the “environmental impact” factor as a comparator, the Claimants state that their experts, Mr. Potes and Mr. Richter, provide enough evidence to assert that there are other projects more environmentally sensitive than Jamaca de Dios’ Phase 2, such as Jarabacoa Mountain Garden, Mirador del Pino, Paso Alto and Quintas del Bosque I and II.<sup>514</sup> In any case, the “environmental impact” factor would be misplaced. According to the Claimants, “*the ‘like circumstances’ analysis must be based on an objective criterion which can easily be assessable by a neutral observer*”.<sup>515</sup>

293. Furthermore, the Claimants claim that this comparator has never been applied by investment arbitration tribunals.<sup>516</sup> The Claimants refer to the analysis in *S.D. Myers* on the “like circumstances” test,<sup>517</sup> in which the tribunal held that the general principles of NAFTA must be taken into account,

including its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. [...] [A]lso take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.<sup>518</sup>

294. The Claimants state that the *S.D. Meyers* tribunal adopted an objective comparator and focused on the assessment of the same business or economic sector to decide on the less favorable treatment claim.<sup>519</sup>

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<sup>511</sup> Reply Memorial, ¶ 444.

<sup>512</sup> Reply Memorial, ¶ 446.

<sup>513</sup> Reply Memorial, ¶ 447.

<sup>514</sup> Reply Memorial, ¶ 448.

<sup>515</sup> Reply Memorial, ¶ 449.

<sup>516</sup> Reply Memorial, ¶ 450.

<sup>517</sup> Reply Memorial, ¶ 451.

<sup>518</sup> *S.D. Myers Inc. v. Government of Canada*, Partial Award (November 13, 2000), ¶ 250, **Exhibit CLA-17**.

<sup>519</sup> Reply Memorial, ¶ 452; *S.D. Myers Inc. v. Government of Canada*, Partial Award (November 13, 2000), ¶ 250, **Exhibit CLA-17**.

295. The Claimants allege that the comparison must be between the planned Phase 2 of Jamaca de Dios and any other project planned or completed in the mountains or in an environmentally sensitive area, in particular in Jarabacoa or Constanza, such as: Quintas del Bosque I and II, Jarabacoa Mountain Garden, Aloma Mountain, Paso Alto, Mirador del Pino, Sierra Fría, La Montaña, Rancho Guaraguao, Alta Vista, Monte Bonito, Los Auquelles and Ocoa Bay.<sup>520</sup> According to the Claimants, all these projects would be environmentally significant, include luxury housing, have slopes in excess of 60%, and be in mountainous areas.<sup>521</sup> If any of these projects is found to be a comparator and the Respondent cannot reasonably justify the disparate treatment, the Respondent would have breached DR-CAFTA.<sup>522</sup>
296. The Claimants allege that since the Respondent has identified Aloma Mountain to be in “like circumstances” with Jamaca de Dios,<sup>523</sup> the conditions for establishing the first part of the “three-part test” regarding this comparator should be considered to have been fulfilled.<sup>524</sup>

**(b) Less Favorable Treatment**

297. Having identified the analysis the Tribunal has to follow and the comparator to focus on, the Claimants discuss the “no less favorable” standard.<sup>525</sup> According to the Claimants, it means “*equivalent to, not better or worse than, the best treatment accorded to the comparator*”.<sup>526</sup> There are two different types of nationality-based discrimination which can result from government measures: *de jure* or *de facto*. A *de jure* discriminatory measure will directly treat certain entities differently, while a *de facto* discriminatory measure are at the outset neutral but they still result in a differential treatment.<sup>527</sup>

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<sup>520</sup> Reply Memorial, ¶ 456.

<sup>521</sup> Reply Memorial, ¶ 457.

<sup>522</sup> Reply Memorial, ¶ 458.

<sup>523</sup> Statement of Defense, ¶¶ 158, 161; Rejoinder on Jurisdiction and Merits, ¶¶ 224-225.

<sup>524</sup> Reply Memorial, ¶¶ 459-462.

<sup>525</sup> Amended Statement of Claim, ¶ 184.

<sup>526</sup> Amended Statement of Claim, ¶ 185; Reply Memorial, ¶ 489; *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Phase 2 Merits Award, (April 10, 2001), ¶ 42; *ADM* (NAFTA), ¶ 205; *Methanex Corporation v. United States of America*, (UNCITRAL) Final Award on Jurisdiction and Merits, (August 3, 2005), Part IV, Chapter B, ¶ 21, **Exhibit CLA-11**. Nicholas DiMascio & Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin’, 102 *Am. J. Int’l L.* 48, 89 (2008) p. 78, **Exhibit CLA-75**; Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer 2009), p. 187, **Exhibit CLA-57**.

<sup>527</sup> Amended Statement of Claim, ¶ 185; *ADM* (NAFTA), ¶ 193; *CPI* (NAFTA), ¶ 115.

298. In this case, the Claimants contend that although the slope restrictions, national park regulations and other measures would also apply to the comparators, they have been applied in a much less favorable manner to the Claimants.<sup>528</sup>
299. While the Respondent denies that the Claimants received a different treatment than Aloma Mountain,<sup>529</sup> the Claimants allege that there was in fact differential treatment between the two projects.<sup>530</sup> Compared to other projects in the area, the Respondent would have treated Jamaca de Dios' Phase 2 less favorably.<sup>531</sup>
300. The Claimants add that the Respondent has failed to satisfy its burden of proving that the less favorable treatment afforded to Jamaca de Dios was justified.<sup>532</sup> In this sense, the Respondent would have had to show that the differential treatment towards the Claimants “*bears a reasonable relationship to rational policies not motivated by*” nationality-based preferences.<sup>533</sup> The Claimants allege that this reasonable relationship to rational policies must be shown at the time when the Claimants were not allowed to develop for having slopes over 60%, while other properties with the same slopes were allowed to; or when the Claimants' private road was nationalized, while other private roads were allowed to remain private.<sup>534</sup>
301. The Claimants contend that a State will not be able to meet the burden if it could have achieved its objective with non-discriminatory measures,<sup>535</sup> as stated in the *S.D. Meyers* award.<sup>536</sup>
302. According to the Claimants, when assessing whether a State's treatment towards an investor bears a “*reasonable relationship to a rational policy*”, the tribunals have identified two elements required to justify the measures. First, there must be a rational policy and second, an “*appropriate correlation between the state's public policy objective and the measure adopted to achieve it*”.<sup>537</sup>

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<sup>528</sup> Amended Statement of Claim, ¶ 186; Reply Memorial, ¶¶ 492-493.

<sup>529</sup> Statement of Defense, ¶ 186.

<sup>530</sup> Reply Memorial, ¶¶ 485-488.

<sup>531</sup> Reply Memorial, ¶ 493.

<sup>532</sup> Amended Statement of Claim, ¶ 187; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), ¶ 176, **Exhibit CLA-5**; Reply Memorial, ¶ 491.

<sup>533</sup> Amended Statement of Claim, ¶ 188; *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Phase 2 Merits Award, (April 10, 2001), ¶¶ 79, 88, **Exhibit CLA-9**.

<sup>534</sup> Amended Statement of Claim, ¶ 188.

<sup>535</sup> Amended Statement of Claim, ¶ 189.

<sup>536</sup> *S.D. Myers v. Canada*, (NAFTA) UNCITRAL, Partial Award, (November 13, 2000), ¶¶ 195, 255, **Exhibit CLA-17**.

<sup>537</sup> Amended Statement of Claim, ¶ 190; Reply Memorial, ¶ 497; *AES Summit Generation Ltd. and AES-Tisza Erömü KRT v. Hungary*, ICSID Case No. ARB/07/22, Award, (September 23, 2010), ¶¶ 10.3.7, 10.3.9, **Exhibit CLA-19**; *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, (December 11, 2013), ¶ 525, **Exhibit CLA-18**.

303. Regarding the first requirement, the rational policy must have been implemented “*following a logical (good sense) explanation and with the aim of addressing a public interest matter*”.<sup>538</sup> Regarding the second, the correlation must be “*reasonable, proportionate, and consistent*” to be considered reasonably related to a rational policy.<sup>539</sup>
304. The Claimants contend that in this case the measure was not consistently applied, as only the Claimants were prevented from developing Phase 2 of Jamaca de Dios, have been placed inside a park and have lost their private road. By contrast, other projects with the same slopes exceeding 60% were allowed to develop, even without permits.<sup>540</sup> Also, the Claimants contend that these circumstances show that the Respondent intended to discriminate against the Claimants, and yet even if the differential treatment was purely accidental or an administrative mistake, “*this would not cure or ameliorate the violation*”.<sup>541</sup> According to the Claimants, there would be no reasonable relationship between the Respondent’s measures and the rational policy alleged by the Respondent.<sup>542</sup>
305. The Claimants hold that the legal standard of “like circumstances” and less favorable treatment does not require that the investor prove that the less favorable treatment was caused by the investor’s nationality, but only that the elements of the test are met.<sup>543</sup> The Claimants state that tribunals have recognized that proving nationality-based discrimination can be an “*insurmountable burden*”.<sup>544</sup> For that reason, a claimant is not required to prove discriminatory intent.<sup>545</sup>

## 2. The Respondent’s Arguments

### (a) National Treatment

306. The Respondent argues that it has not violated its obligation to provide national treatment to the Claimants, as set forth in Article 10.3 DR-CAFTA, based on four arguments: (i) the scope and meaning of Article 10.3; (ii) that the Dominican comparators suggested by the Claimants are not

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<sup>538</sup> Amended Statement of Claim, ¶ 191; *AES*, ¶ 10.3.8, **Exhibit CLA-19**.

<sup>539</sup> Amended Statement of Claim, ¶ 191; *AES*, ¶ 10.3.36, **Exhibit CLA-19**.

<sup>540</sup> Amended Statement of Claim, ¶ 192.

<sup>541</sup> Amended Statement of Claim, ¶ 193.

<sup>542</sup> Reply Memorial, ¶ 491.

<sup>543</sup> Amended Statement of Claim, ¶ 194; Reply Memorial, ¶ 491.

<sup>544</sup> Amended Statement of Claim, ¶ 195; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), ¶ 183, **Exhibit CLA-5**; *International Thunderbird Gaming Corp. v. Mexico* (NAFTA), UNCITRAL Award (January 26, 2006), ¶¶ 176-177, **Exhibit CLA-20**.

<sup>545</sup> Amended Statement of Claim, ¶ 196.

in “like circumstances” as Jamaca de Dios; (iii) that the Dominican Republic accorded the Claimants a treatment no less favorable compared to Dominicans; and (iv) that there are reasonable justifications to explain any differences in such treatment.<sup>546</sup>

307. The Respondent contends that Article 10.3 intends to protect foreign investors and investments against discrimination by comparing them with domestic investors in “like circumstances”.<sup>547</sup> The Parties agree on the three-prong test used by investment arbitral tribunals to assess the host State’s national treatment obligation.<sup>548</sup>

308. As a result, the Claimants have a double burden: first, they must identify at least one Dominican comparator in “like circumstances”; and second, they have the burden of proving that the Dominican Republic has actually treated the Dominican comparator more favorably than the Claimants. However, the Respondent concludes that the Claimants have failed to satisfy either requirement.<sup>549</sup>

309. According to the Respondent, the Claimants have challenged nine measures<sup>550</sup> under Article 10.3:

(i) the denial of permission to develop their property on grounds that the area has slopes over 60%; (ii) the denial of permission to build a road and sell property that is within the boundaries of the Baiguate National Park; (iii) the requirement of environmental permits to construct a road and buildings; (iv) the inclusion of the Ballantines’ property in the Baiguate National Park; (v) the rejection by the President of the Dominican Republic of the appeal against the permit denial; (vi) the non-issuance of a non-objection letter required from municipal authorities to proceed with a proposed mountain lodge project; (vii) the loss of control or dominion over the roads in the Ballantines’ project; (viii) inspections and fines imposed on the Ballantines; and (ix) the imposition on the Ballantines of a requirement to submit environmental compliance reports every six months.<sup>551</sup>

310. Additionally, the Claimants identified several Dominican comparators.<sup>552</sup> The Respondent argues that these alleged comparators are not in “like circumstances” compared to Jamaca de Dios.<sup>553</sup> The Respondent contends that the three factors identified by the Claimants for the “like circumstances” test<sup>554</sup> have not been applied by the tribunals as part of a three-part test.<sup>555</sup> In *Pope*

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<sup>546</sup> Statement of Defense, ¶ 145.

<sup>547</sup> Statement of Defense, ¶ 147.

<sup>548</sup> See *supra* ¶ 282. Amended Statement of Claim, ¶ 148; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (January 12, 2011), ¶ 163, **Exhibit CLA-12**; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Merits Award (April 10, 2001), ¶¶ 73-104, **Exhibit CLA-9**.

<sup>549</sup> Statement of Defense, ¶ 149.

<sup>550</sup> Amended Statement of Claim, ¶ 186.

<sup>551</sup> Statement of Defense, ¶ 150.

<sup>552</sup> Amended Statement of Claim, ¶ 183; Reply Memorial, ¶ 456.

<sup>553</sup> Statement of Defense, ¶ 152.

<sup>554</sup> Amended Statement of Claim, ¶¶ 177-181.

<sup>555</sup> Statement of Defense, ¶ 153.

& *Talbot, Corn Products* and *Grand River* cases, the tribunals applied one of the three factors, based on their appropriateness to the circumstances of each case, rather than applying all of them at once.<sup>556</sup>

311. While the Respondent acknowledges the relevance of the factors set forth by the Claimants, they should not be considered the only factors to be taken into account. In particular, in the present case the Respondent argues that primary consideration should be given to the environmental impact of each of the projects.<sup>557</sup>
312. The Respondent mentions that the Claimants' Project 3 posed risks to the surrounding water resources, possibly causing erosion and mudslides, negatively impacting the ecosystem's biodiversity, and affecting the Cordillera Central's endemic species.<sup>558</sup> Thus, except for Aloma Mountain, the rest of the comparators are not comparable to Jamaca de Dios based on the environmental impact and risks that each posed.<sup>559</sup>
313. The Responder holds that the location of each project indicates its environmental value.<sup>560</sup> Jamaca de Dios' Project 3 is located at an altitude of between 900 and 1260 meters above sea level on Loma La Peña, part of a set of mountains known as "El Mogote System", with a unique environmental value and requiring special protection because of its altitude, water sources and biodiversity. The Respondent states that all the projects identified by the Claimants are outside the El Mogote System and at a much lower altitude, between 600 and 800 meters above sea level.<sup>561</sup>
314. Thus, except for Aloma Mountain, the Respondent argues that the rest of the comparators cannot be considered to be in "like circumstances" regarding the projects' location.<sup>562</sup> In addition, the Respondent states that it has not been proven that any of the comparators provide or intend to provide competing goods or services.<sup>563</sup> Although the Claimants still argue that Aloma Mountain is appropriate as a comparator – because even though it was fined, it kept developing –, the

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<sup>556</sup> Statement of Defense, ¶¶ 154-156; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Merits Award (April 10, 2001), ¶¶ 75, 78, **Exhibit CLA-9**; *Corn Products International v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (January 15, 2008), ¶ 122, **Exhibit CLA-13**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (January 12, 2011), ¶ 167, **Exhibit CLA-12**.

<sup>557</sup> Statement of Defense, ¶ 157.

<sup>558</sup> Statement of Defense, ¶ 158; Expert Report of Inchaustegui, ¶ 81(c).

<sup>559</sup> Statement of Defense, ¶ 158.

<sup>560</sup> Statement of Defense, ¶ 160.

<sup>561</sup> Statement of Defense, ¶ 161; Witness Statement of Eleuterio Martínez, ¶¶ 42-43, 52-56.

<sup>562</sup> Rejoinder on Jurisdiction and Merits, Appendix A.

<sup>563</sup> Statement of Defense, ¶¶ 162-163.

Respondent rejects the comparison for relying on largely anecdotal evidence<sup>564</sup> which “*proves very little on its own*”.<sup>565</sup> The aerial footage would show that construction of a road took place between 2002 and 2006, and further development occurred between 2006 and 2011. However, from then on, there is no additional construction until 2017, since Aloma Mountain was fined in 2013 for building without a permit.<sup>566</sup> Furthermore, Aloma Mountain’s environmental permit request was rejected.<sup>567</sup>

315. Additionally, the Respondent claims that the alleged comparators and Jamaca de Dios are not under the same legal regime.<sup>568</sup> While some comparators are located in other protected areas, the Respondent explains that such protected areas’ classification is different. In a category IV area, for example, more human activities are allowed than in a category II area such as Baiguate National Park.<sup>569</sup>
316. Moreover, the Respondent argues that the comparators and Jamaca de Dios were not subject to the same regulatory measures under the same jurisdictional authority.<sup>570</sup> Many of the alleged comparators did not have an environmental permit, nor had they requested one.<sup>571</sup> If the Claimants seek to compare the fine imposed on them and the lack of fines in the other projects, the Respondent points out that in that case, the claim would be time-barred under the DR-CAFTA three-year limit, since the fine was imposed on November 19, 2009.<sup>572</sup> In any case, the claim would be unfounded because even if it was based on the amount of the fine, it still would not demonstrate discrimination, let alone nationality-based discrimination. Notably, the MMA has imposed fines on eight of the projects mentioned by the Claimants.<sup>573</sup>
317. The Respondent complains about the Claimants’ assertion that the Respondent is not a neutral observer in this case. The MMA’s assessments of the projects are well-documented and pre-date the present arbitration proceedings. The Respondent disputes the contention that an agency created to protect the environment would go against its principles to win the present case. If the MMA did not really care about the environment, it would have been much easier to allow the

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<sup>564</sup> Rejoinder on Jurisdiction and Merits, ¶ 225.

<sup>565</sup> *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (November 3, 2015), ¶ 463, **Exhibit RLA-112**.

<sup>566</sup> Rejoinder on Jurisdiction and Merits, ¶ 227.

<sup>567</sup> Rejoinder on Jurisdiction and Merits, ¶ 226.

<sup>568</sup> Statement of Defense, ¶ 165.

<sup>569</sup> Statement of Defense, ¶ 165.

<sup>570</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 221-222.

<sup>571</sup> Rejoinder on Jurisdiction and Merits, ¶ 222.

<sup>572</sup> Rejoinder on Jurisdiction and Merits, ¶ 223.

<sup>573</sup> Rejoinder on Jurisdiction and Merits, ¶ 223.



Claimants' request for a permit. However, the Respondent's concerns for the environment are genuine and – based on Mr. Booth's and Mr. Deming's Expert Reports – Project 3 would have had a greater negative impact on Jamaca de Dios and on the National Park than Project 2.<sup>574</sup>

318. Accordingly, the Claimants have failed to establish that the comparators are in “like circumstances” with Jamaca de Dios, and thus, the Respondent requests the Tribunal to dismiss their national treatment claim.<sup>575</sup>

**(b) Less Favorable Treatment**

319. The Respondent denies that the Dominican Republic accorded a less favorable treatment to the Claimants than it did to Dominican nationals. According to the second part of the “three-part test”, the Respondent explains that the Claimants have to show that the investor or the covered investment was treated less favorably than a domestic comparator. To do so, the Claimants have the burden of proving a *de jure* or *de facto* discrimination.<sup>576</sup> To demonstrate a *de facto* discrimination, the Claimants have the burden of proving that “*the practical effect of the measures is to create a disproportionate benefit for nationals over non-nationals*”.<sup>577</sup>

320. Although the Claimants allege that they have been subject to deliberate measures to destroy their investment and favor Dominicans, the Respondent contends that these measures have not benefited the Dominican competitors, taking into account that they are considered –according to the Claimants<sup>578</sup> – commercially and financially unviable.<sup>579</sup>

321. The Respondent complains that the Claimants have denounced the measures individually or only parts thereof, distorting the facts. Thus, the Respondent explains in a table the principal measures with respect to which the Claimants raise discrimination claims.<sup>580</sup>

322. As a result, the Respondent divides the different projects shown in the table into two groups. One group consists of projects at a lower altitude, such as Jamaca de Dios' Project 2, Jarabacoa Mountain Garden, Quintas del Bosque, Mirador del Pino and Paso Alto. While all these projects

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<sup>574</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 229-231; Expert Report of Peter Deming, ¶ 48; Expert Report of Pieter Both, ¶¶ 99-100.

<sup>575</sup> Statement of Defense, ¶ 166.

<sup>576</sup> *Marvin Roy Feldman Kapa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), ¶ 173, **Exhibit CLA-5**.

<sup>577</sup> Statement of Defense, ¶ 168; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (November 13, 2000), ¶ 252, **Exhibit CLA-17**.

<sup>578</sup> Amended Statement of Claim, ¶¶ 39, 59, 60.

<sup>579</sup> Statement of Defense, ¶ 169.

<sup>580</sup> Statement of Defense, pp. 99-100.

received a permit, some of them, such as Jarabacoa Mountain Garden, Mirador del Pino and Paso Alto, received a permit imposing slope-related restrictions.<sup>581</sup> The second group comprises projects within the Baiguata National Park, such as Aloma Mountain and Jamaca de Dios' Project 3. Both are also located at a higher altitude than the others and in the El Mogote mountain system,<sup>582</sup> and were thus accorded similar treatment.<sup>583</sup>

323. The Respondent further notes that with regards to the imposition of fines, Dominican-owned projects, similarly to Jamaca de Dios, received fines for violating environmental regulations. The MMA even suspended work on Dominican-owned projects and Jamaca de Dios for violating these regulations.<sup>584</sup> Thus, the Respondent asserts that the treatment given to the Claimants and Jamaca de Dios was not less favorable than to Dominicans and their projects.<sup>585</sup>
324. Lastly, the Respondent contends that it had valid justifications for whatever differential treatment the Claimants received. The differential treatment was justified because it was based on objective distinctions between Jamaca de Dios and the other comparators.<sup>586</sup> The Respondent relies on *GAMI* to argue that a differential treatment has been justified when a host State has proven the existence of legitimate policy or legal reasons for the measures at issue.<sup>587</sup> The Respondent recalls the nine forms of disparate treatment claimed by the Claimants, and states that each form of disparate treatment was grounded on such legitimate policy or legal concerns.<sup>588</sup>
325. First, regarding the denial of the environmental permit for Project 3 because of the slopes exceeding 60%, the Respondent explains that the permit was denied because in their request for terms of reference the Claimants did not clearly express that they would not build on slopes exceeding 60%. The Respondent recognizes that if project owners undertake not to build in areas with slopes exceeding 60%, it grants the permit. However, since the Claimants did not mention in their letter requesting reconsideration the possibility of changing the location or pledging not to develop in any area with slopes exceeding 60%, the Respondent denied the permit.<sup>589</sup>

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<sup>581</sup> Statement of Defense, ¶ 173.

<sup>582</sup> Witness Statement of Prof. Eleuterio Martínez.

<sup>583</sup> Statement of Defense, ¶ 174.

<sup>584</sup> Statement of Defense, ¶ 175.

<sup>585</sup> Statement of Defense, ¶¶ 176-177.

<sup>586</sup> Statement of Defense, ¶ 178.

<sup>587</sup> Statement of Defense, ¶ 179; *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Award (November 15, 2004), ¶ 114, **Exhibit CLA-49**.

<sup>588</sup> Statement of Defense, ¶¶ 180-181.

<sup>589</sup> Statement of Defense, ¶¶ 182-183.

326. Second, regarding the differential treatment between the Claimants and the comparators on conducting activities in the Baiguate National Park, the Respondent explains that there is either no differential treatment, or the differential treatment is based on environmental considerations.<sup>590</sup> There are different types of legal regimes concerning environmental protected areas that affect Jamaca de Dios and the comparators. While Jamaca de Dios is located within a category II National Park, which prohibits a wider range of project development activities; others are located in category IV National Parks, which are less restrictive on business activities.<sup>591</sup> Regarding Aloma Mountain, the Respondent emphasizes that construction was not allowed. Aloma Mountain's first permit request was denied, and a reconsideration request confirmed the first denial. Furthermore, the Respondent points out that Aloma Mountain was fined due to unauthorized construction.<sup>592</sup>
327. Third, regarding the requirements to obtain an environmental permit not imposed on other developers, especially Aloma Mountain and Los Auquelles, the Respondent rejects the Claimants' allegations. Aloma Mountain's permit was denied twice, and a fine on the project was imposed.<sup>593</sup> For Los Auquelles, the Respondent states that the project was never granted a permit, and was similarly fined for unauthorized construction.<sup>594</sup>
328. Fourth, regarding the inclusion of Jamaca de Dios within the Baiguate National Park and the exclusion of other projects, the Respondent relies on its experts and witnesses to explain the legitimate environmental reasons behind the National Park's borders.<sup>595</sup> If the discrimination had been the real reason, the Respondent contends that in that case the Aloma Mountain project would have been completely excluded by the National Park boundaries. Yet, since it shares environmental and height characteristics with Project 3's land, it was included.<sup>596</sup>
329. Fifth, regarding the discriminatory rejection of the Claimants' request for reconsideration, the Respondent argues that the claim does not give factual basis. The Claimants' argument that Jarabacoa Mountain Garden received the permit after meeting with officials of the Dominican

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<sup>590</sup> Statement of Defense, ¶ 184.

<sup>591</sup> Statement of Defense, ¶ 185; Expert Report of Sixto Inchaustegui, ¶¶ 70-72.

<sup>592</sup> Statement of Defense, ¶ 186; **Exhibits R-55, R-142**.

<sup>593</sup> Statement of Defense, ¶ 187.

<sup>594</sup> Rejoinder on Jurisdiction and Merits, ¶ 114, fn 422, ¶ 223; Resolution Fine to Los Auquellos (July 31, 2017), **Exhibit C-137**.

<sup>595</sup> Statement of Defense, ¶ 188; Witness Statement of Prof. Eleuterio Martínez, ¶¶ 40-41, 44-45; Expert Report of Sixto Inchaustegui, ¶¶ 55, 60-62.

<sup>596</sup> Statement of Defense, ¶ 189.

Presidency, is considered hearsay by the Respondent.<sup>597</sup> The Respondent asserts that Jarabacoa Mountain Garden is different to Jamaca de Dios because – while the initial proposal by the promoters was denied – the project accepted the slope restrictions imposed by the MMA.<sup>598</sup>

330. Sixth, regarding the discriminatory non-issuance of the non-objection letter by the Municipality of Jarabacoa, the Respondent considers this a rational reaction, considering that the Claimants only requested a “no objection” letter after the MMA had expressed its concerns on the viability of the project.<sup>599</sup> In addition, the Respondent holds that the Municipality of Jarabacoa replied to the Claimants, explaining that it could not issue it since they were aware of the MMA’s concerns.<sup>600</sup> According to the Respondent, the Municipality acted in the most diligent way possible, in concert with other government bodies and avoiding causing false expectations on the foreign investors.<sup>601</sup>
331. Seventh, regarding the alleged governmental pressure to turn the Claimants’ private road into a public one, once a residential community is legally created, the roads are automatically yielded to the public domain.<sup>602</sup> Furthermore, the Respondent argues that any circumstances related to the road were caused by the Claimants and thus, they are estopped from blaming the Dominican Republic or the Municipality of Jarabacoa.<sup>603</sup> Since the Claimants were the ones who decided to open the road to the public, the Claimants cannot claim discrimination on the private or public nature of the road.<sup>604</sup> In any case, the Respondent adds that it never forced the Claimants to turn their private road into a public one, however since they were blocking the long-standing public easement, the Palo Blanco community had no choice but to use their road.<sup>605</sup>

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<sup>597</sup> Statement of Defense, ¶ 190; Witness Statement of Reynaldo de Rosario, ¶ 9; Second Expert Report of Graviel Peña, ¶ 15.

<sup>598</sup> Statement of Defense, ¶ 191; Letter from Zoila González de Gutiérrez to Santiago Canela Durán, DEA-2869-12 (July 25, 2012), **Exhibit R-144**.

<sup>599</sup> Statement of Defense, ¶ 192.

<sup>600</sup> Statement of Defense, ¶ 193; Letter from Jarabacoa Municipality Council to Michael Ballantine (February 16, 2015), **Exhibit R-93**.

<sup>601</sup> Statement of Defense, ¶¶ 194-195.

<sup>602</sup> Statement of Defense, ¶ 196; Article 6, Law No. 675, *Urbanización, Ornato Público y Construcciones* (August 14, 1944), **Exhibit R-97**.

<sup>603</sup> Statement of Defense, ¶ 198.

<sup>604</sup> Statement of Defense, ¶ 196.

<sup>605</sup> Statement of Defense, ¶ 197.

332. Eighth, regarding the inspections and fines imposed on the Claimants but not on other projects, the Respondent denies this assertion because inspections have been carried out, and fines have been imposed, on other projects as well. Thus, there would be no differential treatment.<sup>606</sup>
333. Ninth, regarding the requirements imposed on the Claimants to submit the EC Reports, the Respondent contends that the same obligation was imposed on other developers who requested an environmental permit. Furthermore, the MMA has imposed a fine on businesses which have not submitted the required EC Reports.<sup>607</sup> The Claimants cannot consider this an added burden because the requirement was already imposed on their Project 2 permit. Lastly, the Respondent reminds the Tribunal that the fine related to the EC Reports submission was imposed after the Claimants had violated several other environmental regulations.<sup>608</sup>
334. In relation to the Claimants' overall discrimination claim,<sup>609</sup> the Respondent states that the MMA invited the Claimants twice to propose alternative sites for their project. According to the Respondent, it would not be reasonable for the MMA to offer its limited time and resources to a project that it has no intention to approve in the end, simply because of its owners.<sup>610</sup>
335. The Respondent relies on DR-CAFTA Article 17.2.1 and the case *Al-Tamimi* to explain that the enforcement of environmental law is not inherently consistent because certain factors, such as the particular circumstances of each subject and project, affect its application.<sup>611</sup>
336. Lastly, the Respondent states that with regards to the Claimants' MFN claim,<sup>612</sup> pursuant to the "three-prong test",<sup>613</sup> the Claimants should have provided a comparator that was neither U.S., nor Dominican. However, the only comparators they have identified are Dominican.<sup>614</sup> The

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<sup>606</sup> Statement of Defense, ¶ 199; Mountain Garden's Payment of Fine for Violation of Law 64-00 (May 23, 2012) **Exhibit R-145**; Resolution No. 445-2016-VGA (December 8, 2016) (imposing a fine in the amount of RD\$2,742,980.00 on Ocoa Bay Town Village Phase 1 for building structures within a national park and outside the area approved for construction), **Exhibit R-73**; Fine On Estación de Servicios Reyna Durán (March 3, 2017) (imposing a fine in the amount of RD\$ 245,640.00 on Estación de Servicios Reyna Durán, a project owned by a Dominican), **Exhibit R-72**.

<sup>607</sup> Statement of Defense, ¶ 200.

<sup>608</sup> Statement of Defense, ¶ 201.

<sup>609</sup> Reply Memorial, ¶ 501.

<sup>610</sup> Rejoinder on Jurisdiction and Merits, ¶ 218; **Exhibits C-8, C-15**.

<sup>611</sup> Rejoinder on Jurisdiction and Merits, ¶ 220; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, ¶ 458, **Exhibit RLA-112**.

<sup>612</sup> Amended Statement of Claim, ¶¶ 168, 170, 173.

<sup>613</sup> Statement of Defense, ¶ 205; Amended Statement of Claim, ¶¶ 174–187; *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (August 25, 2014), ¶¶ 8.27-8.28, 8.61-8.62, 8.77, **Exhibit RLA-77**; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007), ¶ 371, **Exhibit RLA-78**.

<sup>614</sup> Statement of Defense, ¶ 206.

Respondent affirms that the Claimants have not been able to demonstrate a specific treatment accorded to them or their investment which is less favorable than to the one accorded to another foreigner or their investments.<sup>615</sup> As a result, the Claimants' MFN claim should be considered abandoned.<sup>616</sup>

### 3. The United States of America's Non-disputing Party Submission

337. The United States explains that DR-CAFTA Article 10.3 provision forbids nationality-based discrimination between domestic and foreign investors that are in "like circumstances". A claimant has the burden of proving that its investments: (i) were accorded "treatment"; (ii) were in "like circumstances" with domestic investors; and, (iii) received a "less favorable" treatment than that accorded to domestic investors or their investments.<sup>617</sup>
338. The term "like circumstances" will vary according to the facts of each case. The United States interprets the term "circumstances" as "*to denote conditions or facts that accompany treatment as opposed to the treatment itself*".<sup>618</sup> Thus, consideration must be given to several factors, not just the business or economic sector but also the regulatory framework and policy objectives, among others. The foreign and the national investors should be compared in all relevant aspects but for nationality of ownership. Moreover, whether the treatment has been accorded in "like circumstances" under Article 10.3, will depend on all the circumstances, including whether the relevant treatment distinguished between investors or investments on the basis of legitimate public welfare objectives.<sup>619</sup>
339. Moreover, Article 10.3 does not require to accord the investors or investments of another Party the best or most favorable treatment, given to any national investor or the investment of any national.<sup>620</sup>

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<sup>615</sup> Statement of Defense, ¶ 206.

<sup>616</sup> Rejoinder on Jurisdiction and Merits, ¶ 13.

<sup>617</sup> Submission of the United States, ¶¶ 12-13; *United Parcel Service of America, Inc. v. Government of Canada*, NAFTA/UNCITRAL, ICSID Case No. UNCT/02/1, Award on the Merits (May 24, 2007), ¶ 84, **Exhibit CLA-15**.

<sup>618</sup> Submission of the United States, ¶ 14 (Emphasis omitted).

<sup>619</sup> Submission of the United States, ¶ 14.

<sup>620</sup> Submission of the United States, ¶ 15.

**C. WHETHER THE RESPONDENT BREACHED THE FAIR AND EQUITABLE TREATMENT STANDARD**

**1. The Claimants' Arguments**

340. The Claimants contend that the Respondent's actions constitute a violation of the "fair and equitable" treatment ("FET") obligation of Article 10.5 of the DR-CAFTA.<sup>621</sup> Through a comparable analysis, the Claimants conclude that DR-CAFTA Article 10.5 is identical in substance to NAFTA Article 1105.<sup>622</sup> The Claimants state that NAFTA tribunals have held that a State will be deemed to have violated the minimum standard of FET towards a foreign investor if it has violated the investor's legitimate expectations on which the investor relied when making the investment, if it failed to act in good faith or with evident discrimination, or if it engaged in arbitrary conduct.<sup>623</sup>
341. The Claimants argue that the Respondent's measures were discriminatory and arbitrary, and they lacked transparency and due process. These measures would include the creation of the National Park and its effect on the Claimants.<sup>624</sup>
342. The Claimants hold that the investor need not demonstrate the existence of bad faith to prove the State's international responsibility.<sup>625</sup> In this sense, the tribunal in *Mondev v. United States* stated that "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."<sup>626</sup>
343. The Claimants rely on *Mondev*, and *ADF v. United States* to contend that the minimum standard of treatment (the "MST") is a standard under customary law that can evolve.<sup>627</sup> According to the *Mondev* tribunal, bilateral investment treaties include the standard of FET to try to incorporate customary international law, evidencing state practice and *opinio juris*.<sup>628</sup> The Claimants quote the *Glamis Gold* tribunal,<sup>629</sup> which stated that treaty arbitration decisions "serve as illustrations

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<sup>621</sup> Amended Statement of Claim, ¶¶ 197-198.

<sup>622</sup> Amended Statement of Claim, ¶ 199.

<sup>623</sup> Amended Statement of Claim, ¶ 199.

<sup>624</sup> Amended Statement of Claim, ¶ 15; Reply Memorial, ¶ 289.

<sup>625</sup> Amended Statement of Claim, ¶ 200.

<sup>626</sup> Amended Statement of Claim, ¶ 202; *Mondev International Ltd. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 116, **Exhibit CLA-23**.

<sup>627</sup> Amended Statement of Claim, ¶ 201; *Mondev* (NAFTA), ¶¶ 116-117, 124-125, **Exhibit CLA-23**; *ADF Group Inc. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003), ¶¶ 179-186, **Exhibit CLA-24**.

<sup>628</sup> Amended Statement of Claim, ¶ 204; *Mondev* (NAFTA), ¶ 111, **Exhibit CLA-23**.

<sup>629</sup> Amended Statement of Claim, ¶ 204.

*of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.*<sup>630</sup>

344. The Claimants disagree with the Respondent's reliance on the *Neer* decision.<sup>631</sup> First, because the decision issued in 1926 does not reflect the current state of the law on the protection of foreign investors, which in the Claimants' opinion has significantly evolved since the *Neer* decision.<sup>632</sup> Second, because the *Neer* decision would stand in contrast to general state practice.<sup>633</sup>
345. The Claimants request the Tribunal to reject the Respondent's argument<sup>634</sup> that the standard of protection should be the one set out in the *Neer* decision.<sup>635</sup> The Claimants argue that the *Neer* case did not deal with the question on the appropriate level of protection that should be granted to foreign investors, as the tribunals in *Mondev* and *Windstream* explained.<sup>636</sup> According to the Claimants, several scholars have noted the limited relevance of the *Neer* decision, since it does not discuss the protection of investments, but rather a host State's obligation to arrest and punish perpetrators of crimes against aliens.<sup>637</sup>
346. Regarding the second reason, the Claimants argue that even if the *Neer* decision was considered relevant to assess the content and scope of the MST for foreign investors, the standard of protection accorded to them has undeniably changed since 1926.<sup>638</sup> For the Claimants, the decision's general statements stand "*in contrast to state practice*".<sup>639</sup> The Claimants rely on

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<sup>630</sup> *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 605, **Exhibit CLA-25**.

<sup>631</sup> Amended Statement of Claim, ¶ 201; Reply Memorial, ¶ 258.

<sup>632</sup> Reply Memorial, ¶¶ 259-260.

<sup>633</sup> Reply Memorial, ¶ 261.

<sup>634</sup> Statement of Defense, ¶ 215; Rejoinder on Jurisdiction and Merits, ¶ 232.

<sup>635</sup> Amended Statement of Claim, ¶ 201; Reply Memorial, ¶ 258.

<sup>636</sup> Reply Memorial, ¶ 259; *Mondev* (NAFTA), ¶ 115, **Exhibit CLA-23**; *Merrill* (NAFTA), ¶¶ 197, 204, **Exhibit CLA-16**; *Windstream Energy LLC v Canada*, Award, (September 27, 2016), UNCITRAL, ¶ 352, **Exhibit CLA-52**.

<sup>637</sup> Reply Memorial, ¶ 260; J. Paulsson & G. Petrochilos, *Neer-ly Mised?* 22(2) ICSID Rev. 242-257 (2007), **Exhibits CLA-53, CLA-54**; Stephen M. Schwebel, *Is Neer far from Fair and Equitable?* 27(4) Arb. Int'l (2011), pp. 555-561, **Exhibit CLA-55**.

<sup>638</sup> Reply Memorial, ¶ 266.

<sup>639</sup> Reply Memorial, ¶ 261; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶ 216, **Exhibit RLA-24**.



several NAFTA awards to support this.<sup>640</sup> Accordingly, the Claimants affirm that the MST has not remained fixed in time.<sup>641</sup>

347. The Claimants find the Respondent's reliance on *Pope & Talbot*,<sup>642</sup> *Eli Lilly*<sup>643</sup> and *Glamis Gold*,<sup>644</sup> three NAFTA decisions, to defend the applicability of the *Neer* standard to be misleading and incorrect.<sup>645</sup> The Claimants state that the *Pope & Talbot* tribunal explicitly rejected in a previous award any requirement on the claimant to show egregious, outrageous or shocking State conduct to evidence a breach of the FET standard of protection.<sup>646</sup> The Claimants add that *Eli Lilly* award did not address the issue of whether the *Neer* standard is presently applicable, but rather accepted in principle the analysis and conclusions reached by the *Glamis Gold* tribunal on the content of the FET standard and the liability threshold.<sup>647</sup> Lastly, the Claimants acknowledge<sup>648</sup> that the tribunal in *Glamis Gold* stated that “the fair and equitable treatment standard is that as articulated in *Neer*”.<sup>649</sup> However, the Claimants note that the *Glamis Gold* tribunal also held that what is currently considered “egregious” and “shocking” is different to what it was considered so in the 1920s, acknowledging the evolutionary nature of the FET standard.<sup>650</sup>

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<sup>640</sup> Reply Memorial, ¶ 266; *Waste Management, Inc. v. Mexico*, NAFTA, ICSID Case No. ARB(AF)/00/3, Award, (April 30, 2004), ¶ 93, **Exhibit CLA-27**; *GAMI Investments v. Mexico*, NAFTA, UNCITRAL, Award, (November 15, 2004), ¶ 95, **Exhibit CLA-49**; *International Thunderbird Gaming Corp. v. Mexico* (NAFTA), UNCITRAL Award (January 26, 2006), ¶ 194, **Exhibit CLA-20**; *Chemtura Corporation v. Canada*, UNCITRAL, Award, (August 2, 2010), ¶ 122, **Exhibit CLA-60**; *Merrill* (NAFTA), ¶¶ 209, 213, **Exhibit CLA-16**; *Apotex Holdings Inc & Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Award, (August 25, 2014), part IX, ¶ 9.15, **Exhibit CLA-60**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton And Bilcon of Delaware, Inc v Canada*, UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, (March 17, 2015), ¶¶ 433-435, 440, **Exhibit CLA-61**; *Mesa Power Group, LLC v Canada*, UNCITRAL PCA Case No. 2012-17, Award, (March 24, 2016), ¶¶ 497-500, **Exhibit CLA-62**.

<sup>641</sup> Reply Memorial, ¶ 267.

<sup>642</sup> *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages (May 31, 2002), **Exhibit CLA-65**.

<sup>643</sup> *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award, (March 16, 2017), **Exhibit RLA-45**.

<sup>644</sup> *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (June 8, 2009), **Exhibit CLA-25**.

<sup>645</sup> Reply Memorial, ¶ 268.

<sup>646</sup> Reply Memorial, ¶ 269; *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase II (April 10, 2001), ¶ 118, **Exhibit CLA-9**.

<sup>647</sup> Reply Memorial, ¶ 270.

<sup>648</sup> Reply Memorial, ¶ 271.

<sup>649</sup> *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 612, **Exhibit CLA-25**.

<sup>650</sup> Reply Memorial, ¶¶ 271-274; *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 616, **Exhibit CLA-25**.

348. The Claimants rely on the *Railroad* DR-CAFTA award, in which the tribunal held that the MST had evolved since the *Neer* decision, to contend that under the DR-CAFTA the question on the scope and evolutionary character of the MST should therefore be considered settled.<sup>651</sup>
349. The Claimants claim that no DR-CAFTA tribunal has defined the threshold to establish a breach of the MST as an “*extremely high*” one.<sup>652</sup> The Claimants quote the award in *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, which held that the minimum standard is “*infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.*”<sup>653</sup> The Claimants state that in the award there was no reference to an “*extremely high*” threshold of seriousness that would require “*extreme and outrageous*” State conduct,<sup>654</sup> and that the tribunals in *Waste Management v. Mexico* and *Railroad* held a similar opinion.<sup>655</sup>
350. Similarly, the Claimants argue that no NAFTA tribunal has applied an “*extremely high*” threshold, although the existence of a “high” one has been acknowledged.<sup>656</sup> The Claimants rely on *Pope & Talbot* and *Merrill & Ring*,<sup>657</sup> the latter of which applied a lower threshold by requiring States to provide protection to foreign investors “*within the confines of reasonableness*”.<sup>658</sup> According to the Claimants, the *Bilcon* tribunal set the threshold of gravity at a much lower level, with only having to prove the existence of an “injustice” to amount to a violation of the MST under international law,<sup>659</sup> and the *Windstream* tribunal adopted a similar standard.<sup>660</sup>
351. The Claimants contend that the minimum standard of treatment relies upon four pillars: lack of protection against discrimination; arbitrariness; gross unfairness or injustice; and non-

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<sup>651</sup> Reply Memorial, ¶¶ 275-276; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶ 218, **Exhibit RLA-24**.

<sup>652</sup> Reply Memorial, ¶ 278.

<sup>653</sup> *TECO Guatemala Holdings, LLC v. Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/17, Award (December 19, 2013), ¶ 454, **Exhibit CLA-26**.

<sup>654</sup> Reply Memorial, ¶ 278.

<sup>655</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶ 219, **Exhibit RLA-24**.

<sup>656</sup> Reply Memorial, ¶ 280.

<sup>657</sup> Reply Memorial, ¶¶ 281-282; *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL, Phase 2 Merits Award, (April 10, 2001), ¶ 118, **Exhibit CLA-9**.

<sup>658</sup> *Merrill* (NAFTA), ¶¶ 210, 213, **Exhibit CLA-16**.

<sup>659</sup> Reply Memorial, ¶¶ 284-285; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton And Bilcon of Delaware, Inc v Canada*, UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, (March 17, 2015), ¶¶ 441-444, **Exhibit CLA-61**.

<sup>660</sup> Reply Memorial, ¶¶ 286-287; *Windstream*, ¶¶ 358, 362, **Exhibit CLA-52**.

transparency.<sup>661</sup> According to the Claimants, the Respondent has violated each of the four pillars.<sup>662</sup>

**(a) The Respondent's Measures Were Discriminatory**

352. The Claimants state that the Respondent discriminated against them, something prohibited under DR-CAFTA Article 10.5, which also bars discrimination on grounds other than nationality.<sup>663</sup> While the Respondent acknowledges that three cases held that the FET provision in DR-CAFTA does not in itself protect foreign investors from discrimination,<sup>664</sup> the Claimants add four more NAFTA cases to the record advancing that argument.<sup>665</sup>
353. The Claimants add that “*all CAFTA-DR awards that have dealt with the issue till the present date have concluded that discrimination is prohibited under Article 10.5*”.<sup>666</sup> (emphasis added by the Claimants) The awards in *Railroad*, *Waste Management* and *TECO* would endorse the position that discrimination is one of the conducts that may infringe the MST.<sup>667</sup> In addition, the Claimants refer to other awards – outside of the NAFTA and DR-CAFTA context – that have also held that discrimination may violate FET clauses.<sup>668</sup>

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<sup>661</sup> Amended Statement of Claim, ¶ 209; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), ¶ 98 **Exhibit CLA-27**; *GAMI Investments v. Mexico*, NAFTA, UNCITRAL, Award, (November 15, 2004), ¶ 94, **Exhibit CLA-49**; *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (December 19, 2013), ¶¶ 454, 457, **Exhibit CLA-26**; *S.D. Myers I* (NAFTA), ¶¶ 262-263 **Exhibit CLA-17**; *Merrill (NAFTA)*, ¶ 187 **Exhibit CLA-16**; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, (August 30, 2000), ¶ 76, **Exhibit CLA-29**.

<sup>662</sup> Amended Statement of Claim, ¶ 210.

<sup>663</sup> Reply Memorial, ¶¶ 289-290.

<sup>664</sup> Statement of Defense, ¶¶ 218, 220; *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (March 16, 2017), ¶ 440, **Exhibit RLA-45**; *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Award (November 15, 2004), ¶ 94, **Exhibit CLA-49**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**.

<sup>665</sup> Reply Memorial, ¶ 291; *Merrill* (NAFTA), ¶ 208, **Exhibit CLA-16**; *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012), ¶ 152, **Exhibit CLA-67**; *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 616, **Exhibit CLA-25**; *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (March 24, 2016), ¶ 502, **Exhibit CLA-62**.

<sup>666</sup> Reply Memorial, ¶ 293.

<sup>667</sup> Reply Memorial, ¶¶ 294-296; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶ 219, **Exhibit RLA-24**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**; *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (December 19, 2013), ¶ 454, **Exhibit CLA-26**.

<sup>668</sup> Reply Memorial ¶ 297; *Pakerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, (September 11, 2007), **Exhibit CLA-14**; *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID No. ARB/98/2, Award, (May 8, 2008), **Exhibit CLA-70**; *CMS Gas Transmission Company v. Argentina*, Award, (May 12, 2005), **Exhibit CLA-7**.

354. The Claimants disagree with the Respondent's contention that since DR-CAFTA Article 10.5 does not explicitly refer to discrimination, it does not protect foreign investors from it.<sup>669</sup> The Claimants state that there is wide consensus amongst scholars that the MST covers specific types of discrimination, other than nationality.<sup>670</sup> The Claimants add that the *Glamis* tribunal considered that targeted discrimination was prohibited under the FET standard.<sup>671</sup>
355. The Claimants also quote the *Waste Management* award, which held that a conduct that is “discriminatory and exposes the claimant to sectional or racial prejudice”<sup>672</sup> violates the FET standard, a position held by several NAFTA tribunals, as well as by the *Railroad* tribunal.<sup>673</sup> The Respondent's reliance on *Methanex*<sup>674</sup> is criticized by the Claimants because although the *Methanex* tribunal held that nationality-based discrimination was not covered by the FET clause, it refused to decide on whether “sectional or racial prejudice” could be considered a prohibited form of discrimination under NAFTA Article 1105.<sup>675</sup>
356. According to the Claimants, the existence of a high threshold for establishing discriminatory conduct has never been mentioned by a NAFTA or DR-CAFTA tribunal.<sup>676</sup> In the *Eli Lilly* award,

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<sup>669</sup> Reply Memorial, ¶¶ 299-300.

<sup>670</sup> Reply Memorial, ¶ 301; Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer 2009) pp. 289-291, **Exhibit CLA-57**; Roland Kläger, *Fair and Equitable Treatment in International Investment Law*, (Cambridge U. Press 2011) p. 187; G. Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad*, 14 C.L.P. 221 (1961); Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 British YIL 137 (1999), p. 133; Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law*, 6(2) J. World Invest. & Trade 297 (2005) 311-314; S. Schill, *Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed*, 3(2) Transnational Disp. Mgmt. 19 (2006); Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Wolters Kluwer 2012), 448; Ionna Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford U. Press 2008), pp. 177-179, 182; Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43(1) N.Y.U. J. Int'l L. & Pol. (2010) 65, **Exhibit CLA-71**; UNCTAD, *Fair and Equitable Treatment 7* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), p. 82, **Exhibit CLA-72**.

<sup>671</sup> Reply Memorial, ¶ 302; *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), fn 1087, **Exhibit CLA-25**.

<sup>672</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**.

<sup>673</sup> Reply Memorial, ¶ 303; *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012), ¶ 152, **Exhibit CLA-67**; *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (March 24, 2016), ¶ 502, **Exhibit CLA-62**; *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (March 16, 2017), ¶¶ 416, 431, **Exhibit RLA-45**; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶ 219, **Exhibit RLA-24**.

<sup>674</sup> Statement of Defense, ¶ 219; *Methanex Corporation v. United States of America*, (UNCITRAL) Final Award on Jurisdiction and Merits, (August 3, 2005), Part IV, Chapter C, ¶ 25, **Exhibit CLA-11**.

<sup>675</sup> Reply Memorial, ¶ 304; *Methanex Corporation v. United States of America*, (UNCITRAL) Final Award on Jurisdiction and Merits, (August 3, 2005), Part IV, Chapter C, ¶ 26, **Exhibit CLA-11**.

<sup>676</sup> Reply Memorial, ¶ 306.

quoted by the Respondent,<sup>677</sup> the Claimants point out that the tribunal never mentioned the existence of a requirement to prove an intention to discriminate to establish a FET standard breach.<sup>678</sup> For the Claimants, to find discrimination there is no need to prove intent,<sup>679</sup> rather the tribunal must apply the test proposed by the *Saluka* tribunal that “(i) similar entities are (ii) treated differently (iii) and without reasonable justification”.<sup>680</sup>

357. The Claimants allege that the Respondent has discriminated against them on several opportunities.<sup>681</sup> One of such alleged discriminations is the rejection of the Claimants’ request for Phase 2’s expansion under Article 122 of the Environmental Law.<sup>682</sup> By contrast, the Claimants state that twelve projects with slopes over 60% were allowed to develop.<sup>683</sup> Moreover, six projects were granted a license after the Claimants’ request had been denied, three others obtained a license before the Claimants were denied one, and another three were allowed to develop without a permit.<sup>684</sup> According to the Claimants, the Respondent cannot claim that it was unaware of these unauthorized developments, because they were “*mountainside projects where land was cleared, roads put in, and structures built*”.<sup>685</sup> The Claimants hold that the Respondent has not provided any reasonable justification for the difference in the treatment towards the Claimants.<sup>686</sup>

358. The Claimants also disagree with the Respondent’s contention<sup>687</sup> that they are oversimplifying the facts regarding slope restrictions by simply comparing the projects, since other factors should be taken into consideration.<sup>688</sup> These other factors, however, were not mentioned before the filing of the Amended Statement of Claim, and were therefore created solely for this arbitration.<sup>689</sup> In addition, the Claimants’ experts set out that Jamaca de Dios’ Phase 2 would be less environmentally significant than other projects.<sup>690</sup>

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<sup>677</sup> Statement of Defense, ¶ 220.

<sup>678</sup> Reply Memorial, ¶ 307; *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (March 16, 2017), **Exhibit RLA-45**.

<sup>679</sup> Reply Memorial, ¶¶ 309-310.

<sup>680</sup> *Saluka v. Czech Republic*, UNCITRAL, Partial Award, (March 17, 2006), ¶ 180, **Exhibit CLA-74**.

<sup>681</sup> Reply Memorial, ¶ 311.

<sup>682</sup> Reply Memorial, ¶ 312.

<sup>683</sup> Reply Memorial, ¶ 324.

<sup>684</sup> Reply Memorial, ¶¶ 313-314.

<sup>685</sup> Reply Memorial, ¶ 314.

<sup>686</sup> Reply Memorial, ¶ 315.

<sup>687</sup> Statement of Defense, ¶ 125.

<sup>688</sup> Reply Memorial, ¶ 316.

<sup>689</sup> Reply Memorial, ¶¶ 317-319.

<sup>690</sup> Reply Memorial, ¶ 320; Expert Report of Fernando Potes, ¶ 72.

359. The Claimants claim that it was also discriminatory for the Respondent to deny them the right to develop any part of their land, even those parts where the slopes were not exceeding the 60% limit, and yet the Dominican-owned projects were encouraged to resubmit their plans for approval.<sup>691</sup> The Claimants state that only two projects were not allowed to build on the land with slopes exceeding 60%. By contrast, the Claimants never received such an opportunity, even though Mr. Michael Ballantine told Dominican officials that he would not build on land where the slopes were exceeding 60%.<sup>692</sup>
360. The Claimants add that the Respondent discriminated against them through the creation of the National Park.<sup>693</sup> The boundaries of the National Park were allegedly drawn to include the Claimants' property and exclude Dominican properties which nevertheless affected the Baiguate Waterfall and its river, the purported justification for the National Park.<sup>694</sup> Jarabacoa Mountain Garden, Paso Alto or properties owned by prominent Dominicans, were excluded from the National Park, even if their properties were within the Baiguate Waterfall area.<sup>695</sup> Additionally, the Claimants state that even if the creation of the National Park itself was not discriminatory, the way its related restrictions were applied was.<sup>696</sup>

**(b) The Respondent's Measures Were Arbitrary**

361. The Claimants address the two issues raised by the Respondent after acknowledging that DR-CAFTA Article 10.5 forbids arbitrary conduct.<sup>697</sup> (i) whether there exists a specific threshold of severity necessary for establishing an arbitrary conduct; (ii) the soundness of the "two-prong test" to determine whether any conduct should be considered arbitrary.<sup>698</sup>
362. Regarding the first issue, the Claimants contend that several NAFTA tribunals have not affirmed the existence of a high threshold of severity, referring simply to "arbitrary" conduct.<sup>699</sup> Similarly,

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<sup>691</sup> Reply Memorial, ¶¶ 321-322.

<sup>692</sup> Reply Memorial, ¶¶ 322-323.

<sup>693</sup> Amended Statement of Claim, ¶ 211; Reply Memorial, ¶ 332.

<sup>694</sup> Reply Memorial, ¶¶ 332-333.

<sup>695</sup> Reply Memorial, ¶ 333.

<sup>696</sup> Reply Memorial, ¶¶ 334-335.

<sup>697</sup> Statement of Defense, ¶¶ 223-224, 226.

<sup>698</sup> Reply Memorial, ¶¶ 337-338.

<sup>699</sup> Reply Memorial, ¶¶ 340-341, *Merrill* (NAFTA), ¶ 208, **Exhibit CLA-16**; *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012), ¶ 152, **Exhibit CLA-67**; *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (March 24, 2016), ¶ 502, **Exhibit CLA-62**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton And Bilcon of Delaware, Inc v Canada*, UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, (March 17, 2015), ¶ 591, **Exhibit CLA-61**.

the Claimants hold that no DR-CAFTA tribunal has endorsed the existence of a high threshold of severity.<sup>700</sup>

363. Regarding the second issue, the Claimants agree with the “two-prong test” put forward by the Respondent and supported by the *Glamis Gold* and the *Mesa Power* tribunals.<sup>701</sup> However, the Claimants point out that this should be one of the methods used by the Tribunal when determining whether the Respondent’s conduct was “arbitrary” for the purposes of DR-CAFTA generally and the FET provision specifically.<sup>702</sup> Similarly, the Claimants argue that the term “measures” should not be restricted to the Dominican laws or policies but it should also include the Dominican officials’ actions when enforcing said laws and policies.<sup>703</sup>
364. For the Claimants, the first point that would have to be addressed is whether “*there is any rational reason or any logical justification behind the policy which was adopted by Respondent*”.<sup>704</sup> If the answer to this question is negative, then there would be no “legitimate governmental policy” and the policy should be considered arbitrary.<sup>705</sup> If the answer to this first question is positive, one should ask whether there is any reasonable relationship between the measure adopted by the Respondent and the policy underlying such measure.<sup>706</sup>
365. Although the Claimants agree with the Respondent on the nature and content of the test, they disagree on how the test should be applied.<sup>707</sup> According to the Claimants, there is no basis to require the measure to be “*manifestly unreasonable*” to be considered arbitrary and in violation of the MST standard under DR-CAFTA Article 10.5.<sup>708</sup>
366. Based on the “two-prong test”, the Claimants contend that the enforcement of slope restrictions and the creation of the Baiguate National Park were arbitrary in relation to the Claimants.<sup>709</sup>

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<sup>700</sup> Reply Memorial, ¶¶ 342-346; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶¶ 219, 235, **Exhibit RLA-24**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013), ¶ 454, **Exhibit CLA-26**.

<sup>701</sup> Reply Memorial, ¶ 351; Statement of Defense, ¶ 229; *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 803, **Exhibit CLA-25**; *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (March 24, 2016), ¶ 579, **Exhibit CLA-62**.

<sup>702</sup> Reply Memorial, ¶ 352.

<sup>703</sup> Reply Memorial, ¶ 352.

<sup>704</sup> Reply Memorial, ¶ 353.

<sup>705</sup> Reply Memorial, ¶ 353; V. Heiskanen, “Arbitrary and Unreasonable Measures, in Standards of Investment Protection”, in: A. Reinisch (ed.), *Standard of Investment Protection*, Oxford U. Press 2008, pp. 111, 104.

<sup>706</sup> Reply Memorial, ¶ 354; UNCTAD, Fair and Equitable Treatment (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012), p. 78, **Exhibit CLA-72**.

<sup>707</sup> Reply Memorial, ¶ 355; Statement of Defense, ¶ 226.

<sup>708</sup> Reply Memorial, ¶ 355.

<sup>709</sup> Reply Memorial, ¶ 357.

367. The Claimants argue the denial of the permit based on the slopes was arbitrary, because the Respondent never explained “*why an entire area of land is rendered useless because some of that land purportedly has slopes exceeding 60 percent*”.<sup>710</sup> Compared to other projects owned by Dominicans, the Claimants state that they were never asked to adapt their project or to present alternative plans for Jamaca de Dios’ Phase 2.<sup>711</sup>
368. To fulfill the first step of the “two-prong test”, the Claimants affirm that they must ascertain whether there was any rational reason or logical justification behind the Respondent’s policy. The Claimants state that Article 122 of the Environmental Law is too broad to protect certain areas.<sup>712</sup> Instead, the Claimants hold that
- [i]t would be different if the policy allowed for development on the areas where the slopes were not in excess of 60%. But that is not the case here. Had the law been written to allow for development on areas within the property where the slopes did not exceed 60%, this might be allowable under CAFTA-DR.<sup>713</sup>
369. The Claimants add that – even if the policy is not arbitrary in the abstract – there is no reasonable relationship between the differential treatment accorded to the Claimants and the rest of the investors, and the purported policy on slope restrictions.<sup>714</sup>
370. In any event, the Claimants claim that the Respondent’s measures violate DR-CAFTA “*under other measures of arbitrariness*”.<sup>715</sup> The Claimants assert that the use of other factors by the Respondent when deciding on slope issues was arbitrary, because when the Claimants first invested in the Dominican Republic it was their view that there were no slope-based restrictions on development.<sup>716</sup> Additionally, these others factors cannot be found in the Environmental Law.<sup>717</sup>
371. Furthermore, the Claimants argue that the way in which the Environmental Law provides Dominican officials with discretion when deciding the granting of a permit was also arbitrary.<sup>718</sup>
372. The Claimants further assert that the creation of the Baiguate National Park was arbitrary.<sup>719</sup> The Claimants do not take issue with the purported reasons behind the policy that created the National

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<sup>710</sup> Amended Statement of Claim, ¶ 211.

<sup>711</sup> Reply Memorial, ¶¶ 359-362.

<sup>712</sup> Reply Memorial, ¶ 368.

<sup>713</sup> Reply Memorial, ¶ 368.

<sup>714</sup> Reply Memorial, ¶¶ 369-371.

<sup>715</sup> Reply Memorial, ¶ 374.

<sup>716</sup> Reply Memorial, ¶ 374.

<sup>717</sup> Reply Memorial, ¶ 375.

<sup>718</sup> Reply Memorial, ¶ 377.

<sup>719</sup> Reply Memorial, ¶ 378.



Park, but with the mechanics for establishing its boundaries.<sup>720</sup> However, no geographic and environmental features to be purportedly protected by the National Park can be found in the Claimants' property.<sup>721</sup> By contrast, other properties that would affect the Baiguate Waterfall and its river were expressly excluded from the National Park.<sup>722</sup> Thus, the Claimants conclude that the boundaries were drawn arbitrarily, completely disconnected and without any reasonable relationship to the policy goal underneath the creation of the National Park.<sup>723</sup>

**(c) The Respondent's Measures Violated Due Process**

373. The Claimants allege the following breaches of the "due process" umbrella obligation, contained in DR-CAFTA Article 10.5(2): (i) the Respondent's refusal to issue the "no objection" letter; (ii) the Respondent's treatment towards the Claimants regarding the slopes; (iii) the Respondent's treatment towards the Claimants regarding the Baiguate National Park; (iv) the Respondent's non-transparency regarding the slope regulations; and (v) the Respondent's non-transparency regarding the National Park.<sup>724</sup>
374. The Claimants state that NAFTA and DR-CAFTA tribunals have consistently recognized the existence of a due process obligation under NAFTA Article 1105 and DR-CAFTA Article 10.5, respectively.<sup>725</sup> While two of the above five measures can also be examined as violations of the Respondent's transparency obligation, the other three of the Respondent's measures violate the due process obligation exclusively: (i) City of Jarabacoa's refusal to issue a "no objection" letter; (ii) the Respondent's failure to provide any reason for the slopes policy specifically adopted with respect to the Claimants; (iii) the Respondent's failure to adopt a transparent process of the creation of the National Park.<sup>726</sup>
375. Regarding the first measure, the Claimants contend that the City of Jarabacoa arbitrarily refused to act on their request for a "no objection" letter: the Claimants allegedly have neither received

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<sup>720</sup> Reply Memorial, ¶ 379.

<sup>721</sup> Reply Memorial, ¶¶ 381-383; First Expert Report of Graviel Peña, ¶¶ 22-23.

<sup>722</sup> Reply Memorial, ¶¶ 383-384.

<sup>723</sup> Reply Memorial, ¶¶ 382, 385.

<sup>724</sup> Reply Memorial, ¶¶ 387-389; DR-CAFTA, Article 10.5(2), **Exhibit CLA-33**.

<sup>725</sup> Reply Memorial, ¶ 390; *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (December 19, 2013), ¶ 454, **Exhibit CLA-26**; *Spence International Investments and others v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016), ¶ 282, **Exhibit RLA-3**; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶ 219, **Exhibit RLA-24**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**.

<sup>726</sup> Reply Memorial, ¶ 391.

the letter, nor a refusal to issue a letter.<sup>727</sup> The Claimants argue that the due process obligation imposes on the Respondent the duty to respond to the Claimants' request and prevent a prolonged situation of uncertainty that affects their legal rights. The Claimants state that they cannot challenge a decision if they have not received a refusal.<sup>728</sup>

376. The Claimants further claim that the Respondent acted in a manner contrary to due process when it denied the Claimants their development request, while other properties in Jarabacoa with the slopes exceeding 60% were allowed to develop.<sup>729</sup>
377. The Claimants hold that the process of creating the National Park was also in breach of the due process obligation, as it was “*an essentially secret process*”.<sup>730</sup> The creation of the Baiguate National Park was further contrary to due process because it purposefully and unreasonably excluded Dominican-owned properties, while including the Claimants' property within its borders.<sup>731</sup> In addition, according to the Claimants' experts, the National Park Decree did not define the precise boundaries of the National Park and the boundaries shown in it had no relation to the boundaries typically drawn.<sup>732</sup>
378. The Claimants state that the Respondent has the obligation to explain to investors the reasons for adopting measures that affect its interests.<sup>733</sup> Moreover, the Respondent would have failed to enquire with, and communicate to, all potentially affected owners about the National Park's creation, as required by DR-CAFTA.<sup>734</sup> The Claimants add that the Management Plan for the Baiguate National Park was issued seven years after the National Park was created, and yet it is not complete and it does not provide sufficient information and guidance on the uses allowed within the National Park.<sup>735</sup>
379. The Claimants emphasize the importance of the National Park to determine whether the Respondent complied with its due process obligation because it was invoked by the Respondent as a reason for denying the permit to the Phase 2 road. The Claimants rely on the *Metalclad* and

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<sup>727</sup> Amended Statement of Claim, ¶ 211; Reply Memorial, ¶ 392.

<sup>728</sup> Reply Memorial, ¶¶ 393-395; *Windstream Energy LLC v Canada*, Award (September 27, 2016), UNCITRAL, **Exhibit CLA-52**.

<sup>729</sup> Reply Memorial, ¶¶ 396-397; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, (August 30, 2000), ¶ 76, **Exhibit CLA-29**.

<sup>730</sup> Amended Statement of Claim, ¶ 211; Reply Memorial, ¶ 404.

<sup>731</sup> Reply Memorial, ¶¶ 403-404.

<sup>732</sup> Reply Memorial, ¶ 411; Expert Report of Fernando Potes, section 6.4.

<sup>733</sup> Reply Memorial, ¶ 408.

<sup>734</sup> Reply Memorial, ¶¶ 405-406, 408; *International Thunderbird Gaming Corp. v. Mexico* (NAFTA), UNCITRAL Award (January 26, 2006), ¶ 198, **Exhibit CLA-20**.

<sup>735</sup> Reply Memorial, ¶¶ 409-410.

*TECO* awards to argue that a host State may be in breach of its due process obligations when a permit is denied without reasons, or for reasons unrelated to the specific existing requirements for the issuance of the permit.<sup>736</sup>

**(d) The Respondent's Measures Were Non-Transparent**

380. The Claimants argue that the Respondent has breached DR-CAFTA Article 10.5, if the Respondent's transparency obligations under DR-CAFTA Chapter 18 are taken into account and used as a guidance.<sup>737</sup> The Claimants state that NAFTA and DR-CAFTA tribunals have held that transparency is part of each treaty's FET provision.<sup>738</sup>
381. The Claimants hold that the Respondent failed to comply with this obligation – including failing to consult the Claimants – when it comes to the creation of the Baiguat National Park.<sup>739</sup> Neither the Claimants, nor other landowners were personally notified of the creation of the National Park on their land, even after it had been created.<sup>740</sup>

**2. The Respondent's Arguments**

382. The Respondent addresses the Claimants' FET violation claims in two steps: (i) the analysis of the applicable legal standard, and (ii) analysis of the particular measures considered to violate the FET standard.<sup>741</sup>
383. According to the Respondent, the applicable standard is the MST under customary international law.<sup>742</sup> The Respondent relies<sup>743</sup> on the *Neer* case to contend that a breach of the minimum standard of treatment “*should amount to an outrage, to bad faith, to willful neglect of duty, or to*

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<sup>736</sup> Reply Memorial, ¶¶ 413-414; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, (August 30, 2000), ¶¶ 99 *et seq.*, **Exhibit CLA-29**; *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (December 19, 2013), ¶ 587, **Exhibit CLA-26**.

<sup>737</sup> Reply Memorial, ¶¶ 417, 421; Amended Statement of Claim, ¶¶ 260-262.

<sup>738</sup> Reply Memorial, ¶ 418; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), **Exhibit RLA-24**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, (August 30, 2000), **Exhibit CLA-29**.

<sup>739</sup> Reply Memorial, ¶ 424; Expert Report of Mr. Fernando Potes, section 6.2.

<sup>740</sup> Reply Memorial, ¶ 425.

<sup>741</sup> Statement of Defense, ¶ 207.

<sup>742</sup> Statement of Defense, ¶ 208; Rejoinder on Jurisdiction and Merits, ¶ 232.

<sup>743</sup> Statement of Defense, ¶ 209; Rejoinder on Jurisdiction and Merits, ¶ 232.

*an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*”.<sup>744</sup>

384. While the Claimants argue that the MST has evolved since then, the Respondent relies on three NAFTA decisions which endorsed the *Neer* standard.<sup>745</sup> The Respondent concedes that what may be understood as outrage or insufficient governmental action may have evolved since the *Neer* case.<sup>746</sup> However, the Respondent emphasizes that a government breaches the MST only when its conduct rises to such level of outrage.<sup>747</sup> According to the Respondent, the threshold for showing a breach of the MST is very high,<sup>748</sup> as the *Waste Management* tribunal stated that

[t]aken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety— as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.<sup>749</sup> (Emphasis added by the Respondent)

385. The Respondent argues that this standard was endorsed by the *Railroad* tribunal – as mentioned by the Claimants – and by other NAFTA and CAFTA tribunals.<sup>750</sup> In particular, the *GAMI* tribunal underscored four conclusions from the *Waste Management* award that show the rigor of the standard.<sup>751</sup> The Respondent further grounds its argument in the other standards set out in *Thunderbird* and *Glamis Gold*, and by other non-NAFTA or non-DR-CAFTA tribunals.<sup>752</sup>

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<sup>744</sup> *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, United States-Mexico Commission, Decision (October 15, 1926), pp. 61-62, **Exhibit RLA-85**.

<sup>745</sup> Statement of Defense, ¶ 210; *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (March 16, 2017), ¶ 222, **Exhibit RLA-45**; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (June 8, 2009), ¶¶ 612, 627, **Exhibit CLA-25**; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages (May 31, 2002), ¶ 68, **Exhibit RLA-56**.

<sup>746</sup> Rejoinder on Jurisdiction and Merits, ¶ 232.

<sup>747</sup> Statement of Defense, ¶ 210; Rejoinder on Jurisdiction and Merits, ¶ 232.

<sup>748</sup> Statement of Defense, ¶ 210.

<sup>749</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**.

<sup>750</sup> Statement of Defense, ¶ 211; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), ¶¶ 219, 235, **Exhibit RLA-24**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013), ¶ 454, **Exhibit CLA-26**; *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award (November 15, 2004), ¶¶ 95-96, **Exhibit CLA-49**; *Methanex Corporation v. United States of America*, UNCITRAL, Award (August 3, 2005), Part IV, Chapter C, ¶ 11, **Exhibit CLA-11**.

<sup>751</sup> *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Award (November 15, 2004), ¶ 97, **Exhibit CLA-49**.

<sup>752</sup> Statement of Defense, ¶¶ 212-214; *International Thunderbird Gaming Corp. v. Mexico (NAFTA)*, UNCITRAL Award (January 26, 2006), ¶ 194, **Exhibit CLA-20**; *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶¶ 615-616, **Exhibit CLA-25**; *Alex Genin et al. v. The Republic of Estonia*, ICSID Case No.

386. Taking into account the cases set out above, the Respondent contends that the threshold is very high for the Claimants to prove that the Respondent breached the FET standard.<sup>753</sup>
387. As to each particular measure, the Respondent understands that there are eight measures that are allegedly in breach of Article 10.5 of DR-CAFTA: (i) the denial of an environmental permit based on the slopes; (ii) the creation of Banguate National Park; (iii) the permit's denial based on the National Park; (iv) the inspections conducted on the Claimants' property; (v) the fines imposed on the Claimants; (vi) the alleged order to make the Project 1 road public; (vii) the application of environmental rules such as the submission of EC Reports; and (viii) the Municipality of Jarabacoa's refusal to issue a "no objection" letter.<sup>754</sup>

**(a) The Respondent's Measures Were Not Discriminatory**

388. The Respondent explains that the FET provision in the DR-CAFTA does not protect foreign investors against discrimination because it does not mention the word, nor any related term or synonym.<sup>755</sup> Other articles do refer to discriminatory treatment directly, such as Article 10.3 and Article 10.4. Thus, following the principle *expressio unius est exclusio alterius*, the Respondent concludes that these are the only types of discriminatory treatment covered by DR-CAFTA Chapter 10.<sup>756</sup> The Respondent adds that arbitral tribunals have reached the same conclusion.<sup>757</sup>
389. The Respondent holds that even if DR-CAFTA Article 10.5 would prohibit discriminatory treatment, the threshold would still be high, and it would require proving the host State's discriminatory intent.<sup>758</sup> In particular, the Respondent raises that while the Claimants argue that there is no requirement to prove intent, they contend that the Respondent "*specifically targeted*"

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ARB/99/2, Award (June 25, 2010), ¶ 367, **Exhibit RLA-56**; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (November 3, 2015), ¶ 390, **Exhibit RLA-112**

<sup>753</sup> Statement of Defense, ¶ 215; Rejoinder on Jurisdiction and Merits, ¶ 232.

<sup>754</sup> Statement of Defense, ¶ 217; Amended Statement of Claim, ¶ 211.

<sup>755</sup> Statement of Defense, ¶ 218; Rejoinder on Jurisdiction and Merits, ¶ 234.

<sup>756</sup> Rejoinder on Jurisdiction and Merits, ¶ 234.

<sup>757</sup> Statement of Defense, ¶ 219; Rejoinder on Jurisdiction and Merits, ¶ 234. *Methanex Corporation v. United States of America*, (UNCITRAL) Final Award on Jurisdiction and Merits, (August 3, 2005), Part IV, Chapter C, ¶¶ 14, 25, **Exhibit CLA-11**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (January 12, 2011), ¶ 208, **Exhibit CLA-12**.

<sup>758</sup> Statement of Defense, ¶ 220; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (March 28, 2011), ¶ 261, **Exhibit RLA-38**; *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award (March 16, 2017), ¶ 440, **Exhibit RLA-45**.

the Claimants.<sup>759</sup> For the Respondent, one cannot target someone without intending to do so.<sup>760</sup> The Respondent argues that the Claimants have failed to prove such an intent.<sup>761</sup>

390. The Respondent contends that the Claimants have given up on their claim that the creation of the Baiguate National Park was discriminatory.<sup>762</sup> Thus, the only claims left would be the invocation of Article 122 of the Environmental Law and the National Park for the denial of the environmental permit.<sup>763</sup>
391. Regarding the application of Article 122 of the Environmental Law, the Respondent argues that the claim is identical to the Claimants' national treatment claim – and so it should be dismissed for the same reasons. The Claimants contend that Article 122 of the Environmental Law was applied discriminatorily because other projects which had slopes in excess of 60% were granted a permit.<sup>764</sup> The Respondent emphasizes that the slopes were not the only reason for rejecting the Claimants' permit request. In this sense, the Claimants were notified that the Jamaca de Dios project in itself was environmentally not viable because the use of the land was restricted by Article 122 of the Environmental Law.<sup>765</sup>
392. The Respondent points out that Article 122 of the Environmental Law forbids any intensive labor that can increase soil erosion and sterilization on mountainous areas with slopes greater than 60%. The Respondent contends that it was impossible for the Claimants to cut a road without undertaking such an amount of work.<sup>766</sup>
393. Regarding the comparison with other projects holding a permit although they have slopes exceeding 60%, the Respondent recognizes this fact but explains that those projects and their land were different from the Claimants, and thus, they are not suited as comparators, since none of those projects tried to develop within a national park or at the same altitude.<sup>767</sup> The only project with an elevation comparable to Jamaca de Dios Project 3 is La Montaña, and which is why La

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<sup>759</sup> Reply Memorial, ¶¶ 308-309, 311.

<sup>760</sup> Rejoinder on Jurisdiction and Merits, ¶ 235.

<sup>761</sup> Statement of Defense, ¶ 221.

<sup>762</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 213, 235, 257; Response to the Objection to Admissibility, ¶¶ 2 (“the creation of the National Park itself did not give rise to a claim for the Ballantines”), 73 (“the drawing of lines of a Park is not by itself a breach”).

<sup>763</sup> Rejoinder on Jurisdiction and Merits, ¶ 235.

<sup>764</sup> Reply Memorial, ¶¶ 312-314.

<sup>765</sup> Rejoinder on Jurisdiction and Merits, ¶ 238; Letter from Zoila González de Gutiérrez to Michael Ballantine (September 12, 2011), **Exhibit C-8**; Letter from Zoila González de Gutiérrez to Michael Ballantine (March 8, 2012), **Exhibit C-11**; Environmental Law, Article 122, **Exhibit R-3**.

<sup>766</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 239, 243.

<sup>767</sup> Rejoinder on Jurisdiction and Merits, ¶ 240, Appendix A.

Montaña's permit restricted any construction beyond 1300 meters above sea level.<sup>768</sup> Similarly, the Respondent affirms that the Claimants cannot compare Jamaca de Dios with unauthorized projects with slopes greater than 60%, because penalizing an unauthorized activity is not the same as denying a permit.<sup>769</sup>

394. For the Claimants, the fact that the permit was rejected in its entirety – rather than only with respect to the areas with slopes exceeding 60% – shows the Respondent's discriminatory intent.<sup>770</sup> However, the Respondent states the Claimants agreed at the time that, before requesting a permit for the development itself, they should first request approval for the road.<sup>771</sup> In practical terms, this meant that if the permit for the road was not granted, the rest of the expansion would be equally rejected.<sup>772</sup>
395. On the Baiguante National Park, the Respondent raises the same arguments as it did for the Claimants' national treatment claims. The projects used as comparators by the Claimants are not suitable, either because they did not receive a permit or because if they did, they were not a mountain project.<sup>773</sup>

#### (b) The Respondent's Measures Were Not Arbitrary

396. The Respondent asserts that it has not acted arbitrarily towards the Claimants.<sup>774</sup> While the MST protects foreign investors from arbitrary State conduct, some tribunals have noted that it has to be "*manifestly arbitrary*".<sup>775</sup> (Emphasis added by the Respondent) The Respondent relies<sup>776</sup> on certain NAFTA and DR-CAFTA awards to conclude that a State conduct is arbitrary when there is a "*lack of reasons*"<sup>777</sup> or a "*manifest lack of reasons*".<sup>778</sup> The Respondent quotes the *Glamis*

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<sup>768</sup> Rejoinder on Jurisdiction and Merits, ¶ 240; Environmental Permit La Montana (January 19, 2018), **Exhibit R-276**.

<sup>769</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 241, 223.

<sup>770</sup> Reply Memorial, ¶ 321; Amended Statement of Claim, ¶ 100.

<sup>771</sup> Rejoinder on Jurisdiction and Merits, ¶ 243; First Witness Statement of Michael Ballantine, ¶ 55; Reply Memorial, ¶ 366. *See supra* ¶ 116.

<sup>772</sup> Rejoinder on Jurisdiction and Merits, ¶ 243.

<sup>773</sup> Rejoinder on Jurisdiction and Merits, ¶ 245. *See supra* ¶ 315.

<sup>774</sup> Statement of Defense, ¶¶ 224, 228.

<sup>775</sup> *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 626, **Exhibit CLA-25**.

<sup>776</sup> Statement of Defense, ¶ 224.

<sup>777</sup> *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (December 19, 2013), ¶ 587, **Exhibit CLA-26**.

<sup>778</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), ¶ 627, **Exhibit CLA-5**; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (June 8, 2009), ¶ 803, **Exhibit CLA-25**.

*Gold* tribunal,<sup>779</sup> which defined “arbitrariness” as a “*gross denial of justice or manifest arbitrariness falling below acceptable international standards*”.<sup>780</sup>

397. The Respondent explains that as long as a measure is reasonable, it cannot be considered arbitrary.<sup>781</sup> According to *Glamis Gold*, a State conduct will be reasonable if (i) it is rationally related to the stated purpose; and (ii) it has been reasonably drafted to address its objectives.<sup>782</sup> The Respondent states that the Claimants have to prove either the lack of rationality of the policy underlying the measures, or that the measure was not reasonably correlated to the policy.<sup>783</sup> Yet, the Respondent argues that the Claimants’ arguments challenge neither.<sup>784</sup>
398. Regarding the Claimants’ argument that Article 122 of the Environmental Law was not a rational policy in the abstract,<sup>785</sup> the Respondent rejects it on the basis that Article 10.5 of DR-CAFTA does not allow claims based on the rationality of the law.<sup>786</sup> Because the FET standard focuses on a treatment given by the host State to the investor, the Respondent states that investors cannot challenge a law they may find irrational in the abstract. On the contrary, the investors would be obliged to take the law as found when entering a host State voluntarily.<sup>787</sup>
399. The Respondent further contends that the Claimants’ arbitrariness claims fail because the Respondent’s conduct was reasonable and proportionate.<sup>788</sup> The Respondent understands that the Claimants’ arbitrariness claims are simply a reexamination of their discrimination claims, and so resorts to its arguments in that regard.<sup>789</sup> However, the Respondent clarifies that it did not establish a complete bar to the project,<sup>790</sup> and that the MMA invited the Claimants at least twice to propose alternative sites for their project.<sup>791</sup> Furthermore, the Respondent states that the other factors applied by the MMA were not arbitrary, since said factors were of core relevance for assessing

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<sup>779</sup> Statement of Defense, ¶¶ 224-225.

<sup>780</sup> *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 625, **Exhibit CLA-25**.

<sup>781</sup> Statement of Defense, ¶ 226.

<sup>782</sup> *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 803, **Exhibit CLA-25**.

<sup>783</sup> Statement of Defense, ¶ 227.

<sup>784</sup> Statement of Defense, ¶ 228.

<sup>785</sup> Reply Memorial, ¶ 368.

<sup>786</sup> Rejoinder on Jurisdiction and Merits, ¶ 251.

<sup>787</sup> Rejoinder on Jurisdiction and Merits, ¶ 251; C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration*, Oxford University Press (2007), ¶ 7.180, **Exhibit RLA-124**; *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award (March 31, 2010), ¶ 233, **Exhibit CLA-16**.

<sup>788</sup> Statement of Defense, ¶ 228.

<sup>789</sup> Rejoinder on Jurisdiction and Merits, ¶ 247. *See supra* Section VII.C.2.a.

<sup>790</sup> Rejoinder on Jurisdiction and Merits, ¶ 248.

<sup>791</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 249-250.



the development restriction under Article 122 of the Environmental Law.<sup>792</sup> Lastly, the Respondent asserts that the discretion afforded to Dominican officials in the application of the Environmental Law is entirely consistent with international law.<sup>793</sup>

**(c) The Respondent Acted in Accordance With Due Process**

400. The Respondent considers the Claimants' three due process claims are unfounded.<sup>794</sup> First, with respect to the alleged non-issuance of the "no objection" letter for Project 4 by the Municipality of Jarabacoa,<sup>795</sup> the Respondent states that that the Claimants were not left in a legal limbo.<sup>796</sup> Under Dominican law, the doctrine of administrative silence creates a presumption of a rejection, when the government authorities do not respond to a request within a particular amount of time. As a result, individuals can initiate an appeal before the competent judicial authorities even if a particular request has not yet been explicitly rejected.<sup>797</sup> The Claimants, who had Dominican lawyers,<sup>798</sup> should have known this and could have acted accordingly.<sup>799</sup>
401. The Claimants' second due process allegation is related to the MMA's enforcement of Article 122 of the Environmental Law.<sup>800</sup> The Claimants contend that the MMA had an obligation to explain the reasons for adopting specific measures that affected the Claimants' interests.<sup>801</sup> The Respondent rejects the Claimants' arguments by stating that the MMA in numerous opportunities sent letters to the Claimants explaining why the permit was being rejected, how the applicable legal regime worked, and replying to the Claimants' comments.<sup>802</sup>

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<sup>792</sup> Rejoinder on Jurisdiction and Merits, ¶ 252.

<sup>793</sup> Rejoinder on Jurisdiction and Merits, ¶ 253.

<sup>794</sup> Rejoinder on Jurisdiction and Merits, ¶ 255.

<sup>795</sup> Reply Memorial, ¶¶ 392-395.

<sup>796</sup> Rejoinder on Jurisdiction and Merits, ¶ 255.

<sup>797</sup> Rejoinder on Jurisdiction and Merits, ¶ 255; Law 1,494 of 1947 on Contentious-Administrative Jurisdiction, Art. 2, **Exhibit R-339**.

<sup>798</sup> First Witness Statement of Michael Ballantine, ¶ 13; Email from Michael Ballantine to B. Guzman (July 22, 2008), **Exhibit R-225**.

<sup>799</sup> Rejoinder on Jurisdiction and Merits, ¶ 255.

<sup>800</sup> Reply Memorial, ¶¶ 396-402.

<sup>801</sup> Reply Memorial, ¶¶ 398, 401-402.

<sup>802</sup> Rejoinder on Jurisdiction and Merits, ¶ 256; Letter from Ministry to M. Ballantine (September 12, 2011), **Exhibit C-8**; Letter from Ministry to M. Ballantine (March 8, 2012), **Exhibit C-11**; Letter from Ministry to M. Ballantine (December 18, 2012), **Exhibit C-13**; Letter from Ministry to M. Ballantine (January 15, 2014), **Exhibit C-15**.

402. The Claimants' final due process claim is that the creation of the Bague National Park was a "secret process".<sup>803</sup> The Respondent puts forward that the National Park Decree was published in the Official Gazette, the principal official publication instrument for decrees, executive orders, and laws in the Dominican Republic.<sup>804</sup> The Respondent argues that the Claimants' experts acknowledged the appropriateness of the publication of a decree for stakeholders to participate in the boundaries definition of protected areas.<sup>805</sup>
403. The Claimants reject the publication in the Official Gazette because they considered it insufficient in explaining the effect of the National Park's creation and precise boundaries, and to know its scope and extent.<sup>806</sup> However, the Respondent points out that Empaca Redes, the Claimants' environmental consultant, – now alleging lacking the necessary information – was able to explain to the Claimants in September 2010 the location of the National Park and what its existence meant.<sup>807</sup>

**(d) The Respondent Did Not Act in a Non-Transparent Manner Towards the Claimants**

404. The Respondent similarly considers that the Claimants' transparency claims should fail because the FET provision does not create a transparency obligation, as stated in *Merrill & Ring*.<sup>808</sup> The Respondent adds that the Claimants cannot import the requirements in Chapter 18 to Article 10.5, since doing so would violate the interpretative principle *expressio unius est exclusio alterius*.<sup>809</sup>
405. Even if DR-CAFTA's FET provision included a transparency obligation, the Respondent argues that the claim would still fail because the Dominican Republic does not have a "secretive" regulatory system.<sup>810</sup> Regarding the denial of the environmental permit, the Respondent states that the Claimants were given an opportunity to identify an alternative location.<sup>811</sup> Furthermore,

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<sup>803</sup> Amended Statement of Claim, ¶ 211; Reply Memorial, ¶ 404.

<sup>804</sup> Statement of Defense, ¶ 238; Rejoinder on Jurisdiction and Merits, ¶ 257.

<sup>805</sup> Rejoinder on Jurisdiction and Merits, ¶ 257, Expert Report of Fernando Potes, footnote 21, ¶ 21(d).

<sup>806</sup> Reply Memorial, ¶¶ 409-410.

<sup>807</sup> Rejoinder on Jurisdiction and Merits, ¶ 258; Emails between (1) M. Ballantine and Zuleika Salazar, and (2) Mario Mendez and Miriam Arcia of Empaca (September 22-29, 2010), **Exhibit R-169**; Email from Miriam Arcia to M. Ballantine, Mario Méndez, and Zuleika Salazar (September 22, 2010), **Exhibit R-170**.

<sup>808</sup> Statement of Defense, ¶ 236; *Merrill & Ring v. Canada* (NAFTA), UNCITRAL, Award, (March 31, 2010), ¶ 231, **Exhibit CLA-16**; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 133, **Exhibit CLA-5**.

<sup>809</sup> Rejoinder on Jurisdiction and Merits, ¶ 260.

<sup>810</sup> Statement of Defense, ¶ 237; *Merrill & Ring v. Canada* (NAFTA), UNCITRAL, Award, (March 31, 2010), ¶ 231, **Exhibit CLA-16**.

<sup>811</sup> Statement of Defense, ¶ 237.

the MMA took into consideration certain other factors that were environmentally critical, even if they were not explicitly stated in the Environmental Law.<sup>812</sup> The Respondent contends that because of the complex nature of issues tackled by governments, not all factors may be legislatively addressed in advance, and so some degree of regulatory discretion would be required.<sup>813</sup> Moreover, the Respondent holds that the Claimants' experts and consultants were able to identify these very same critically relevant environmental factors that are unmentioned by the Environmental Law.<sup>814</sup>

406. On the second measure, the Respondent explains that the creation of the National Park was conducted through a formal decree signed by the President and published in the Official Gazette, and its promulgation was widely publicized in the media.<sup>815</sup> The Respondent considers that it is irrelevant that the MMA did not identify the Baiguate National Park in the first denial, since the boundaries were clear and adequately publicized.<sup>816</sup> Also, the Respondent explains that it had no obligation under Dominican law to consult the creation of the National Park with the Claimants.<sup>817</sup> Nevertheless, the Claimants had an opportunity under Dominican administrative law to challenge any decree of general application.<sup>818</sup>

**(e) The Claimants Cannot Rely on the Cumulative Effect of the Measures**

407. The Respondent rejects the Claimants' contention<sup>819</sup> that the Respondent's measures must not be analyzed individually, but rather their cumulative effect must be taken into consideration.<sup>820</sup> The Respondent relies on the *Glamis* tribunal,<sup>821</sup> which explained that “for acts that do not

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<sup>812</sup> Rejoinder on Jurisdiction and Merits, ¶ 262.

<sup>813</sup> Rejoinder on Jurisdiction and Merits, ¶ 262; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton And Bilcon of Delaware, Inc v Canada*, UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, (March 17, 2015), ¶ 437, **Exhibit CLA-61**.

<sup>814</sup> Rejoinder on Jurisdiction and Merits, ¶ 263; Witness Statement of David Almanzar, ¶ 4; Proposal for Terrain and Road Engineering, ECON Consulting (2010), **Exhibit R-275**.

<sup>815</sup> Statement of Defense, ¶ 238; Certification of the Gaceta Oficial No. 10535 (September 7, 2009) containing Decree No. 571-09 (August 7, 2009) **Exhibit R-77**; Parque Nacional Baiguate, *Fundación Ambiental Acción Verde* (October 22, 2009), **Exhibit R-60**; *Poder Ejecutivo crea mediante decreto 37 nuevas áreas protegidas en todo el país*, Listin Diario (October 14, 2009), **Exhibit R-61**; *Poder Ejecutivo crea 37 nuevas áreas protegidas*, Diario Libre (October 14, 2009) **Exhibit R-62**.

<sup>816</sup> Statement of Defense, ¶ 238.

<sup>817</sup> Statement of Defense, ¶ 239.

<sup>818</sup> Statement of Defense, ¶ 239; Ley No. 137-11, *Orgánica del Tribunal Constitucional y de los procesos constitucionales*, Articles 36 and 51 (June 15, 2011), **Exhibit R-161**.

<sup>819</sup> Amended Statement of Claim, ¶ 212.

<sup>820</sup> Statement of Defense, ¶ 247.

<sup>821</sup> Statement of Defense, ¶ 247.

*individually violate [Article 10.5] to nonetheless breach that article when taken together, there must be some additional quality that exists only when the acts are viewed as a whole*".<sup>822</sup> The Claimants have not explained the additional quality and so, it would be unclear "what the nature of the asserted claim based on 'cumulative' effects consists of, or what the relevant cause of action is".<sup>823</sup>

### 3. Non-disputing Parties' Submission

#### (a) Costa Rica

408. Costa Rica argues that DR-CAFTA Article 10.5 sets out the conditions of the MST that each Contracting Party must accord to DR-CAFTA-covered investments.<sup>824</sup> Costa Rica emphasizes the instructions in Article 10.5's first paragraph to accord investments treatment in accordance with customary international law, including FET, and the second paragraph's directive not to give a treatment beyond the one required by the MST.<sup>825</sup> Costa Rica further relies on DR-CAFTA Annex 10-B to contend that FET consist of the MST under customary international law.<sup>826</sup> For Costa Rica, the obligation of FET is breached when there is a situation of extreme denial of justice or manifest injustice, resulting in a lack of due process.<sup>827</sup>
409. Costa Rica argues that if a claim is brought due to a breach of DR-CAFTA Article 10.5, the claimant has the burden of proving that the standard was breached under customary international law, relying on general and consistent State practice and *opinio iuris*.<sup>828</sup> According to Costa Rica, this shall be the main source of interpretation for the MST.<sup>829</sup> This standard was also confirmed under NAFTA Article 1105 by the NAFTA Commission.<sup>830</sup> Additionally, Costa Rica also relies on the test as set out in *Waste Management* and *Cargill* for the infringement of the MST.<sup>831</sup>

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<sup>822</sup> *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 825, **Exhibit CLA-25**.

<sup>823</sup> Statement of Defense, ¶ 247.

<sup>824</sup> Submission of Costa Rica, ¶ 11.

<sup>825</sup> Submission of Costa Rica, ¶¶ 11-12.

<sup>826</sup> Submission of Costa Rica, ¶ 13.

<sup>827</sup> Submission of Costa Rica, ¶ 12; DR-CAFTA, Articles 10.5.1, 10.5.2, **Exhibit R-10**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶ 132.

<sup>828</sup> Submission of Costa Rica, ¶ 14.

<sup>829</sup> Submission of Costa Rica, ¶ 15.

<sup>830</sup> Submission of Costa Rica, ¶ 16.

<sup>831</sup> Submission of Costa Rica, ¶¶ 17-18; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), ¶ 98, **Exhibit CLA-27**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, (September 18, 2009), ¶ 296, **Exhibit CLA-8**.

410. As a result, Costa Rica notes that conclusions can be drawn on the difference between complying with national and international law. Also, proof of good faith in the authority's efforts to comply with the objectives of its laws and regulations should be taken into account by tribunals when deciding whether international law was violated.<sup>832</sup>
411. Costa Rica notes that in *Mercer International*, the tribunal found that the MST provision does not cover discrimination, which is addressed in the national treatment and most-favored-nation treatment provisions.<sup>833</sup>
412. While some awards have interpreted FET as an autonomous standard with a broader and more ambiguous interpretation, Costa Rica considers that such an interpretation would not be consistent with DR-CAFTA, which has linked the provision to customary international law. Therefore, when alleging a breach of DR-CAFTA Article 10.5, Costa Rica puts forward that the claimant must prove that (i) there is a customary international law rule; (ii) the host State engaged in conduct that breached such rule; and (iii) the host State's conduct caused loss or damage.<sup>834</sup>

**(b) United States of America**

413. The United States agrees with Costa Rica that it was the Contracting Parties' intention to establish the MST as defined under customary international law, as the applicable standard under DR-CAFTA Article 10.5.<sup>835</sup> The obligation to provide FET includes certain obligations, such as not denying justice; affording due process; not expropriating covered investments in violation of Article 10.7's conditions; and providing full protection and security.<sup>836</sup>
414. The United States notes that DR-CAFTA Annex 10-B establishes the methodology for interpreting customary international law rules covered by DR-CAFTA, namely, State practice and *opinio iuris*.<sup>837</sup> The ICJ noted in a recent decision that national court decisions, domestic legislation dealing with a particular issue alleged to be the norm of customary international law or, official declarations by relevant State actors on the subject at issue can serve as evidence of State practice.<sup>838</sup>

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<sup>832</sup> Submission of Costa Rica, ¶ 19.

<sup>833</sup> Submission of Costa Rica, ¶ 20; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (March 6, 2018), ¶¶ 7.87-7.89.

<sup>834</sup> Submission of Costa Rica, ¶ 21.

<sup>835</sup> Submission of the United States, ¶ 17.

<sup>836</sup> Submission of the United States, ¶ 18.

<sup>837</sup> Submission of the United States, ¶ 19.

<sup>838</sup> Submission of the United States, ¶ 20; *Jurisdictional Immunities of the State*, 2012 I.C.J. at 122, 123.

415. However, the United States does not consider the element of “transparency” part of FET under customary international law.<sup>839</sup> It states that it is not aware of any general and consistent State practice and *opinio iuris* which establishes a transparency obligation on a host State under the MST.<sup>840</sup> Moreover, a tribunal under Chapter 10 does not have jurisdiction to address matters that arise under Chapter 18. The jurisdiction of the tribunal is limited to claims based on a host State’s breach of an obligation under Chapter 10, Section A, an investment authorization, or an investment agreement.<sup>841</sup> Furthermore, Chapter 18 is subject to the State-State dispute resolution provisions in Chapter 20.<sup>842</sup>
416. Additionally, the United States argues that the concept of legitimate expectations is not part of FET under customary international law giving rise to an independent host State obligation. The United States recognizes that an investor may develop its own expectations about the legal framework governing its investment but those will not impose any obligations on the host State. Also, the United States is not aware of any general and consistent State practice and *opinio iuris* establishing an obligation under the MST not to frustrate the investor’s expectations.<sup>843</sup>
417. The United States adds that the MST standard in DR-CAFTA Article 10.5.1 does not include a prohibition on economic discrimination against foreigners or a general obligation of non-discrimination.<sup>844</sup> A State can treat foreigners and nationals differently, even foreigners from different States.<sup>845</sup> The customary international law MST incorporated in Article 10.5 prohibits discrimination, yet only in the context of other established customary international law rules. Moreover, investment claims on nationality-based discrimination are governed exclusively by the provisions of DR-CAFTA Chapter 10 that specifically address the subject, not by Article 10.5.1.<sup>846</sup>

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<sup>839</sup> Submission of the United States, ¶ 21; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), ¶ 133, **Exhibit CLA-5**; *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award (March 31, 2010), ¶¶ 208, 231, **Exhibit CLA-16**.

<sup>840</sup> Submission of the United States, ¶ 21.

<sup>841</sup> Submission of the United States, ¶ 22; *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Jurisdiction, (December 6, 2000), ¶ 61; *Grand River Enterprises Six Nations Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, (January 12, 2011), ¶ 71, **Exhibit CLA-12**.

<sup>842</sup> Submission of the United States, ¶ 22.

<sup>843</sup> Submission of the United States, ¶ 23.

<sup>844</sup> Submission of the United States, ¶ 24; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA), UNCITRAL, Award (January 12, 2011), ¶¶ 208-209, **Exhibit CLA-12**.

<sup>845</sup> *Methanex v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (August 3, 2005), Part IV, Chapter C, ¶¶ 25-26, **Exhibit CLA-11**.

<sup>846</sup> Submission of the United States, ¶ 24; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (March 4, 2018), ¶ 7.58; *Methanex Corporation v. United States of America*, (UNCITRAL) Final Award on Jurisdiction and Merits, (August 3, 2005), Part IV, Chapter C, ¶¶ 14-17, 24, **Exhibit CLA-11**.

418. The United States agrees with Costa Rica that the interpretation of autonomous FET and full protection and security provisions cannot constitute evidence of the customary international law standard set out in DR-CAFTA Article 10.5. Likewise, decisions of international tribunals and arbitral tribunals interpreting FET as a concept of customary international law are not State practice for purposes of evidencing customary international law, although they can be relevant for determining State practice when they include an analysis of it.<sup>847</sup>
419. Accordingly, the United States argues that a claimant has the burden of proof to establish the existence of an obligation under customary international law. Once the rule has been established, by virtue of State practice and *opinio iuris*, the claimant must demonstrate that the State has engaged in a conduct that has breached the rule. A showing of a breach of the MST “*must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.*”<sup>848</sup>

#### **D. WHETHER THE RESPONDENT EXPROPRIATED THE CLAIMANTS’ INVESTMENT**

##### **1. The Claimants’ Arguments**

420. The Claimants argue that the Respondent’s actions amount to an illegal expropriation under DR-CAFTA.<sup>849</sup> The Claimants contend that the Respondent has expropriated their investment through a series of measures that have prevented the Claimants from using their investment and deprived them of its value.<sup>850</sup>
421. Under DR-CAFTA, an indirect expropriation takes place when a governmental action or a series of them have an effect equivalent to direct expropriation but without the formal transfer of title or outright seizure.<sup>851</sup> Thus, the Claimants contend that they do not have to show that the Respondent formally seized their investments but rather that an indirect expropriation occurred, in accordance with the three-factor test set out in DR-CAFTA Annex 10-C.<sup>852</sup>

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<sup>847</sup> Submission of the United States, ¶ 25; *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 605, **Exhibit CLA-25**.

<sup>848</sup> Submission of the United States, ¶¶ 26-28; *S.D. Myers*, First Partial Award, ¶ 263, **Exhibit CLA-17**; *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA/UNCITRAL, Award (January 26, 2006), ¶ 127, **Exhibit CLA-20**.

<sup>849</sup> Amended Statement of Claim, ¶¶ 227, 240; Reply Memorial, ¶¶ 508-509.

<sup>850</sup> Amended Statement of Claim, ¶ 237.

<sup>851</sup> DR-CAFTA, Annex 10-C, ¶ 4, **Exhibit R-10**.

<sup>852</sup> Amended Statement of Claim, ¶ 231; Reply Memorial, ¶¶ 504, 507.

422. The Claimants rely on DR-CAFTA Annex 10-C to state that for governmental action or actions to amount to expropriation,<sup>853</sup> there must be an interference “*with a tangible or intangible property right or property interest in an investment*”.<sup>854</sup> Three factors must be considered:
- (i) the economic impact of the government action [...] (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.<sup>855</sup>
423. To define indirect expropriation, the Claimants resort to an authority on the matter,<sup>856</sup> which stated that a
- taking of property includes [...] any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.<sup>857</sup>
424. The Claimants contend that the extent of an “*unreasonable interference*” will depend on the circumstance of the case.<sup>858</sup> In this sense, the Claimants add that indirect expropriation occurs when a government measure results in “*substantial deprivation*” of the investor’s economic rights or of the reasonably-expected economic benefits from its investment, even though the investor still retains the nominal or legal ownership of its investment.<sup>859</sup>
425. The Claimants argue that substantial deprivation of an investment occurs when,<sup>860</sup> e.g. an investment is no longer capable of generating a commercial return,<sup>861</sup> the loss, wholly or in part, of the use or “*reasonably-to-be*” expected economic benefit of the investment,<sup>862</sup> an investment

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<sup>853</sup> Amended Statement of Claim, ¶ 232.

<sup>854</sup> DR-CAFTA Annex 10-C, ¶ 2, **Exhibit R-10**.

<sup>855</sup> DR-CAFTA Annex 10-C, ¶ 4(a), **Exhibit R-10**.

<sup>856</sup> Amended Statement of Claim, ¶ 233.

<sup>857</sup> Louis B. Sohn and R. R. Baxter, “Responsibility of States for Injuries to Aliens,” 55 *Am. J. Int’l L.* 545, p. 553 (1961).

<sup>858</sup> Amended Statement of Claim, ¶ 233; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, (July 14, 2006), ¶ 313, **Exhibit CLA-35**.

<sup>859</sup> Amended Statement of Claim, ¶ 234; Reply Memorial, ¶ 506; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Award (July 30, 2010), ¶ 134, **Exhibit CLA-36**.

<sup>860</sup> Amended Statement of Claim, ¶ 230.

<sup>861</sup> *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, (December 14, 2012), ¶ 398, **Exhibit CLA-28**.

<sup>862</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, (August 30, 2000), ¶ 103, **Exhibit CLA-29**; *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05, Award (November 21, 2007), ¶ 240, **Exhibit CLA-6**.



whose most economically optimal use has been rendered useless<sup>863</sup> or an investment's economic value has been neutralized or destroyed.<sup>864</sup>

426. The Claimants reject<sup>865</sup> the Respondent's argument that indirect expropriation requires a "virtual taking" such that "the investor no longer [is] in control of its business operation, or that the value of the business [is] virtually annihilated".<sup>866</sup> The Claimants rely on customary international law to affirm that the deprivation need only be lasting and substantial to constitute an expropriation,<sup>867</sup> without the need of virtually annihilating the business.<sup>868</sup>
427. The Claimants claim that the Respondent's expropriation is illegal because the Respondent has acted in a discriminatory manner, and because it has failed to pay the Claimants compensation.<sup>869</sup>
428. Pursuant to DR-CAFTA Article 10.7, a legal expropriation occurs when the governmental taking is (i) for a public purpose; (ii) non-discriminatory; (iii) on payment of a prompt, adequate and effective compensation; and (iv) in accordance with due process of law.<sup>870</sup> The Claimants note that all of these criteria must be satisfied by the Respondent's actions to consider the expropriation legal.<sup>871</sup>
429. The Claimants consider that the Respondent's expropriation did not satisfy these criteria.<sup>872</sup> The Claimants allege that the expropriatory acts were discriminatory, because while the Claimants' land was rendered useless, other Dominican projects were allowed to develop.<sup>873</sup>

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<sup>863</sup> *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05, Award (November 21, 2007), ¶ 246, **Exhibit CLA-6**.

<sup>864</sup> *TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), ¶ 115, **Exhibit CLA-30**; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, (November 30, 2012), ¶ 6.62, **Exhibit CLA-31**; *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, (September 13, 2001), ¶ 604, **Exhibit CLA-32**.

<sup>865</sup> Reply Memorial, ¶ 506.

<sup>866</sup> Statement of Defense, ¶ 261.

<sup>867</sup> Amended Statement of Claim, ¶ 235; *Pope & Talbot Inc. v. Government of Canada*, Interim Award (June 26, 2000), ¶ 102, **Exhibit CLA-10**.

<sup>868</sup> Reply Memorial, ¶ 506; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, (August 30, 2000), **Exhibit CLA-29**; *CMS Gas Transmission Company v. Argentina*, Award, (May 12, 2005), **Exhibit CLA-7**.

<sup>869</sup> Reply Memorial, ¶¶ 509-510; Amended Statement of Claim, ¶ 240; *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Award, (March 13, 2015), **Exhibit CLA-38**.

<sup>870</sup> DR-CAFTA, Article 10.7, **Exhibit R-10**.

<sup>871</sup> Amended Statement of Claim, ¶ 241.

<sup>872</sup> Amended Statement of Claim, ¶ 242.

<sup>873</sup> Amended Statement of Claim, ¶ 246; Reply Memorial, ¶ 509.

430. The Claimants further state that the Respondent has not paid them any compensation, thus it cannot be assessed whether it is prompt, adequate and effective.<sup>874</sup> Under DR-CAFTA, the compensation must be

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.<sup>875</sup>

431. As a result, the Claimants hold that the Respondent has not satisfied the requirements to consider that the expropriation of the Claimants’ investment was legal.<sup>876</sup>

## 2. The Respondent’s Arguments

432. The Respondent rejects the Claimants’ direct expropriation claims,<sup>877</sup> which have, in any event, been waived by the Claimants.<sup>878</sup> The Respondent similarly rejects the Claimants’ indirect expropriation claims.<sup>879</sup>

433. The Respondent argues that the Claimants’ overlapping expropriation claims cannot simultaneously be true since the same investment could not be expropriated multiple times.<sup>880</sup> Furthermore, the Respondent states that any expropriation claims based on the creation of the National Park are time-barred by DR-CAFTA Article 10.18.1, as detailed above.<sup>881</sup>

434. In addition, the Respondent asserts that there was no indirect expropriation because the Claimants have not established that there was a “*substantial deprivation*” of their entire investment.<sup>882</sup> The Respondent contends that “*substantial deprivation*” requires an interference that must be severe and tantamount to the direct expropriation of the whole investment, as DR-CAFTA and

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<sup>874</sup> Amended Statement of Claim, ¶ 247; Reply Memorial, ¶ 510.

<sup>875</sup> DR-CAFTA, Article 10.7.2, **Exhibit R-10**.

<sup>876</sup> Amended Statement of Claim, ¶¶ 251-252; Reply Memorial, ¶¶ 509-510.

<sup>877</sup> Statement of Defense, ¶ 259; Rejoinder on Jurisdiction and Merits, ¶ 266.

<sup>878</sup> Hearing Transcript, Day 1, 112:4-8 (English).

<sup>879</sup> Statement of Defense, ¶ 260; Rejoinder on Jurisdiction and Merits, ¶¶ 264-265, 270.

<sup>880</sup> Rejoinder on Jurisdiction and Merits, ¶ 266; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 622, **Exhibit CLA-70**.

<sup>881</sup> Rejoinder on Jurisdiction and Merits, ¶ 265. *See supra* Section VI.A.

<sup>882</sup> Statement of Defense, ¶ 261; Rejoinder on Jurisdiction and Merits, ¶ 267.

investment arbitration case law makes clear.<sup>883</sup> However, the Respondent states that the Claimants cannot establish any level of interference.<sup>884</sup>

435. The Respondent adds that the Claimants' assertion that their land has lost its value must be rejected.<sup>885</sup> While it is true that the Claimants were unable to develop the purchased land, the Respondent affirms that they assumed that risk when they purchased that land with slopes exceeding 60% after the Environmental Law had been passed, and the Claimants could still use the land for other purposes, such as ecotourism.<sup>886</sup>
436. Moreover, according to the Respondent the "substantial deprivation" test examines the investment in its entirety.<sup>887</sup> However, the Respondent alleges that the Claimants have only argued that part of their investment was expropriated, which means that no expropriation took place if the investment is analyzed in its entirety.<sup>888</sup>
437. Furthermore, the Respondent considers that the Claimants allege the expropriation of a right they did not possess.<sup>889</sup> The Respondent explains that the approval of Phase 2 was subject to the MMA's approval, and that the City of Jarabacoa has a level of discretion when deciding whether to issue a "no objection" letter, which means that the development of the land was not an automatic right the Claimants were entitled to.<sup>890</sup>

### 3. Non-disputing Parties' Submission

#### (a) Costa Rica

438. The investments covered by DR-CAFTA are protected from direct and indirect expropriation. First, however, the asset in question must fall under the investment definition in Article 10.28. In particular, the investment must be considered so under domestic law to be considered likewise

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<sup>883</sup> Statement of Defense, ¶ 261; DR-CAFTA, Annex 10-C, ¶¶ 3-4, **Exhibit R-10**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004), ¶ 160, **Exhibit CLA-27**; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (September 28, 2007), ¶ 285, **Exhibit RLA-79**.

<sup>884</sup> Statement of Defense, ¶ 261; Rejoinder on Jurisdiction and Merits, ¶ 267.

<sup>885</sup> Statement of Defense, ¶ 266; Rejoinder on Jurisdiction and Merits, ¶ 268.

<sup>886</sup> Statement of Defense, ¶ 266.

<sup>887</sup> Statement of Defense, ¶ 264; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability (November 30, 2012), ¶ 6.57, **Exhibit CLA-31**.

<sup>888</sup> Statement of Defense, ¶ 264.

<sup>889</sup> Statement of Defense, ¶¶ 262-263; Rejoinder on Jurisdiction and Merits, ¶ 269; *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Award (April 16, 2014), ¶ 159.

<sup>890</sup> Statement of Defense, ¶¶ 262-263; Rejoinder on Jurisdiction and Merits, ¶ 269.

under international law.<sup>891</sup> Indeed, it cannot be claimed that a State has expropriated a right, when such right “*does not exist under domestic law.*”<sup>892</sup> Second, DR-CAFTA Article 10.8 must be interpreted in accordance with Annexes 10-B and 10-C.<sup>893</sup>

439. Regarding indirect expropriation, Costa Rica advances that the Tribunal should read DR-CAFTA Article 10.7 together with Annex 10-C. Costa Rica notes that Annex 10-C’s paragraph 4(b) excludes measures of general application and State actions taken in relation to single investments to enforce public welfare, safety, health, environmental and other legitimate objectives, pursuant to the Contracting Parties’ agreement. This express desire must be granted a high relevance when a tribunal has to decide on any indirect expropriation claim.<sup>894</sup> Moreover, DR-CAFTA Article 10.7 reflects a customary international law standard as recognized by investment arbitral tribunals.<sup>895</sup> The exercise of State police powers which are non-discriminatory and in good faith do not constitute indirect expropriation. Under customary international law, the doctrine of police powers comprehends a State’s right to enforce existing regulations with respect to an investor.<sup>896</sup> However, the State’s actions must be analyzed to see whether they are a *bona fide* exercise of police powers.<sup>897</sup>

**(b) United States of America**

440. The United States distinguishes between direct and indirect expropriation, by virtue of DR-CAFTA.<sup>898</sup> The former occurs “*when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure*”.<sup>899</sup> The latter, “*where an action*

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<sup>891</sup> Submission of Costa Rica, ¶ 23; *EnCana Corporation v. Republic of Ecuador*, (LCIA Case No. UN3481, UNCITRAL) Award, (March 2, 2006), ¶ 184; *Nations Energy Inc. Electric Machinery Enterprises Inc and Jaime Jurado v. Panama*, ICSID Case No. ARB/06/19, Award (November 24, 2010), ¶¶ 641-648.

<sup>892</sup> Submission of Costa Rica, ¶ 23.

<sup>893</sup> Submission of Costa Rica, ¶ 24.

<sup>894</sup> Submission of Costa Rica, ¶¶ 26-27.

<sup>895</sup> Submission of Costa Rica, ¶ 28; *Fireman’s Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (July 17, 2006), ¶ 176; *Methanex Corporation v. United States of America*, (UNCITRAL) Final Award on Jurisdiction and Merits, (August 3, 2005), Part IV, Chapter D, ¶ 15, **Exhibit CLA-11**.

<sup>896</sup> Submission of Costa Rica, ¶ 28; *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Counter-memorial (April 8, 2016), ¶ 628.

<sup>897</sup> Submission of Costa Rica, ¶¶ 28-30; *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL) Partial Award (March 17, 2006), ¶ 255, **Exhibit CLA-74**.

<sup>898</sup> Submission of the United States, ¶ 29.

<sup>899</sup> DR-CAFTA, Annex 10-C, ¶ 3, **Exhibit R-10**.

*or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*"<sup>900</sup>

441. DR-CAFTA Article 10.7 sets out the conditions for expropriation. If an expropriation does not comply with the requirements set out in Article 10.7, it will be in breach thereof. When an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. Accordingly, paragraph 4 of Annex 10-C provides guidelines for an action to be considered an indirect expropriation. Although the analysis should be on a case-by-case basis, certain factors are included, such as: (i) the economic impact of the governmental action; (ii) the extent to which that action interferes with distinct, reasonable expectations; and (iii) the character of the governmental action.<sup>901</sup>
442. The United States explains that the first factor, an adverse economic impact, does not establish an indirect expropriation by itself. International law requires that the claimant demonstrate that the governmental action at issue destroyed all, or virtually all, of the investment's economic value, or interfered with it to such an extent and so restrictively that one concludes that the property has been taken from the owner.<sup>902</sup> The second factor requires an objective analysis of the reasonableness of the claimant's expectations, which may depend on the regulatory framework existing while the property was acquired, in the particular sector in which the investment was made.<sup>903</sup> The third factor considers the nature and character of the governmental action, including whether it was of a physical or regulatory nature.<sup>904</sup>

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<sup>900</sup> DR-CAFTA, Annex 10-C, ¶ 3, **Exhibit R-10**.

<sup>901</sup> Submission of the United States, ¶¶ 30-32.

<sup>902</sup> Submission of the United States, ¶ 33; *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award, (June 26, 2000), ¶ 102, **Exhibit CLA-10**; *Glamis Gold v. United States*, NAFTA, UNCITRAL, Award (June 8, 2009), ¶ 357, **Exhibit CLA-25**.

<sup>903</sup> Submission of the United States, ¶ 34; *Methanex Corporation v. United States of America*, (UNCITRAL) Final Award on Jurisdiction and Merits, (August 3, 2005), Part IV, Chapter D, ¶ 9, **Exhibit CLA-11**.

<sup>904</sup> Submission of the United States, ¶ 35.

## VIII. DAMAGES

### A. THE CLAIMANTS' ARGUMENTS

443. The Claimants contend that the Respondent has caused them direct damages in the amount of USD 37.5 million,<sup>905</sup> afterwards re-assessed by their expert, Mr. Farrel, to total USD 35.5 million.<sup>906</sup> Additionally, the Claimants are requesting that the Respondent be liable for moral damages in the amount of USD 4 million, roughly equivalent to 10% of the Ballantine's commercial damages.<sup>907</sup>

#### 1. Direct Damages

444. The Claimants explain that the customary international law standard for the assessment of damages caused by an unlawful act is set out in the *Chorzów Factory* Permanent Court of International Justice case,<sup>908</sup> in which the tribunal noted that:

reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>909</sup>

445. The Claimants additionally resort to the *Metalclad* award and the International Law Commission's (the "ILC") Articles on State Responsibility to elaborate on the standard set out by *Chorzów Factory* and argue that damages should also be awarded based on any lost profits.<sup>910</sup>

446. The Claimants contend that their investment suffered due to the Respondent's measures.<sup>911</sup> As to the Respondent's argument that the Claimants fail to identify which damages result from which treaty breaches, the Claimants explain, "*the damages [...] do not depend on the specific violation but rather from what is necessary to wipe out the consequences*".<sup>912</sup>

447. The Claimants argue that, prior to the Respondent's actions, the Claimants had been successful in developing Phase 1 of Jamaca de Dios, which gave them reasonable and appropriate

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<sup>905</sup> Amended Statement of Claim, ¶ 275.

<sup>906</sup> Second Expert Report of Mr. Farrell, p. 15.

<sup>907</sup> Amended Statement of Claim, ¶ 276.

<sup>908</sup> Amended Statement of Claim, ¶ 277; Reply Memorial, ¶ 517.

<sup>909</sup> *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 at 47 (September 13), **Exhibit CLA-39**.

<sup>910</sup> Amended Statement of Claim, ¶¶ 278-279; Reply Memorial, ¶ 518; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1 Award, (August 30, 2000), ¶ 122, **Exhibit CLA-29**; *Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session 56 U.N. GAOR Supp. (No. 10) at art. 35, U.N. Doc. A/56/10 (2001)*, **Exhibit CLA-41**; Commentary to Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, United Nations (2001), p. 238, **Exhibit RLA-84**.

<sup>911</sup> Amended Statement of Claim, ¶ 281.

<sup>912</sup> Reply Memorial, ¶ 520.

expectations, and confidence towards the economic prospects of Phase 2.<sup>913</sup> For this reason, the Claimants hold that the damages requested are not based on a speculative claim but on historic and economic facts resulting from their investment in Jamaca de Dios' Phase 1.<sup>914</sup>

448. The Claimants claim that Mr. Farrel, the Claimants' expert from Berkley Research Group, calculated their monetary damages based on:

- a. distributable cash flows from Phase 2 land;
- b. distributable cash flows from the construction of luxury homes in Phase 2;
- c. distributable cash flows from remaining lots in Phase 1;
- d. expansion cost of the Aroma restaurant;
- e. distributable cash flows from the Mountain Lodge;
- f. distributable cash flows from the Apartment Complex;
- g. distributable cash flows from the Phase 2 boutique hotel and spa;
- h. distributable cash flows from development of the Paso Alto project;
- i. loss of future investment and brand diminution;
- j. loss of the value of the Phase 1 expropriated road; and
- k. prejudgment interest compounded monthly.<sup>915</sup>

449. The Claimants clarify that the damages set out in Expert Reports of Mr. Farrell would be "*available to the Ballantines irrespective of how this Tribunal characterizes Respondent's CAFTA-DR violations*".<sup>916</sup>

450. The Claimants criticize the mitigation arguments made by Mr. Hart, the Respondent's expert, because such considerations would relate to a legal issue, rather than a question of quantum.<sup>917</sup> Nevertheless, the Claimants assert that they had no duty to mitigate any loss because – observing their alleged competitors – they reasonably believed to be allowed to develop.<sup>918</sup>

451. The Claimants advocate for the use of the discounted cash flow ("DCF") method. Although the method requires a certain degree of estimation, the Claimants allege that its primary inputs derive

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<sup>913</sup> Amended Statement of Claim, ¶ 283; Reply Memorial, ¶ 514.

<sup>914</sup> Reply Memorial, ¶¶ 515-516; Hearing Transcript, Day 1, 122:18-25 (English).

<sup>915</sup> Amended Statement of Claim, ¶ 284.

<sup>916</sup> Amended Statement of Claim, ¶ 288.

<sup>917</sup> Reply Memorial, ¶ 540.

<sup>918</sup> Reply Memorial, ¶¶ 542-544.

from Phase 1.<sup>919</sup> Accordingly, the Claimants argue DCF is the best method to uphold the *Chorzów* standard and wipe out the consequences derived from the Respondent's unlawful acts.<sup>920</sup>

**(a) Lost Profits Due to Phase 2 Lot Sales and Construction**

452. The Claimants assert that they would have been able to develop 70 lots in Phase 2 of Jamaca de Dios, equivalent to 210,000 square meters.<sup>921</sup> The Claimants claim that Phase 2's higher altitude would have allowed them to request a higher price per square meter when compared to the Phase 1 lot sales.<sup>922</sup> The Claimants add that they expected additional revenue due to the requirement on Phase 2 lot purchasers to use the Claimants' construction division.<sup>923</sup> Mr. Farrell calculated the net present value of the loss of Phase 2 lot sales to be USD 12,752,668, and the loss from the Claimants' construction division to be USD 5,044,625.<sup>924</sup>

**(b) Expansion Cost of Aroma de la Montaña Restaurant**

453. The Claimants hold that they expanded the Aroma de la Montaña restaurant in anticipation of the expansion of the Jamaca de Dios complex, and that if they had known that the permit would be denied, they would have never expanded the restaurant.<sup>925</sup>

454. The Respondent objects to the Claimants' claims for loss due to the Aroma de la Montaña restaurant because it belongs to Ms. Rachel Ballantine, who is not a party to the arbitration.<sup>926</sup> However, the Claimants argue that since Ms. Rachel Ballantine issued a power of attorney to Mr. Michael Ballantine to represent her ownership interest in Restaurante Aroma de la Montaña, E.I.R.L., this would be an investment controlled by them and therefore covered under DR-CAFTA.<sup>927</sup>

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<sup>919</sup> Reply Memorial, ¶ 545; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (March 13, 2015), ¶ 202, **Exhibit CLA-38**; *Fleming Duty Free Shop Private Limited v. Republic of Poland*, UNCITRAL, Award (August 12, 2016), ¶ 910.

<sup>920</sup> Reply Memorial, ¶ 547.

<sup>921</sup> Amended Statement of Claim, ¶ 291.

<sup>922</sup> Amended Statement of Claim, ¶ 292.

<sup>923</sup> Amended Statement of Claim, ¶ 294.

<sup>924</sup> Second Expert Report of Mr. Farrell, p. 17, Exhibit 1.

<sup>925</sup> Amended Statement of Claim, ¶ 300; Reply Memorial, ¶ 523.

<sup>926</sup> Statement of Defense, ¶¶ 287-288; Rejoinder on Jurisdiction and Merits, ¶ 344.

<sup>927</sup> Reply Memorial, ¶ 526; Second Witness Statement of Michael Ballantine, ¶ 67.



455. The Claimants request USD 1.2 million in compensation for the Aroma de la Montaña expansion costs incurred.<sup>928</sup>

**(c) Lots Profits for the Mountain Lodge and the Apartment Complex, and Avoided Losses Related to the Boutique Hotel and the Spa**

456. The Claimants affirm that they spent “*significant time, effort, and money in developing plans for the construction of three different multi-unit buildings*”.<sup>929</sup> The Claimants’ intentions were to build a mountain lodge, an apartment complex,<sup>930</sup> and a boutique hotel with a spa, in Jamaca de Dios.<sup>931</sup>

457. While the Respondent states that the Claimants did not take any positive steps to undertake these developments,<sup>932</sup> the Claimants contend that they had produced plans for these expansions, and even made certain permit requests with the Dominican authorities with showed these planned developments.<sup>933</sup>

458. Mr. Farrell calculates that the non-construction of the boutique hotel saved the Claimants USD 475,164; while the Claimants suffered losses in relation to the other developments, equivalent to USD 1,293,658 for the lack of sales related to the mountain lodge, USD 477,488 for lost profits in operating the mountain lodge, USD 847,726 for the lack of sales related to the apartment complex, and USD 302,419 for lost profits in operating the apartment complex.<sup>934</sup>

**(d) Lost Profits Associated with the Development of Paso Alto Project**

459. The Claimants argue that they planned on purchasing and developing the Paso Alto project, but that they did not move forward due to the Respondent’s measures.<sup>935</sup>

460. The Respondent rejects the Claimants’ damages requests based on the Paso Alto project because the Claimants’ purchase option expired in April 2011, before the alleged DR-CAFTA breaches.<sup>936</sup> The Claimants contend that the completion of the transaction was contingent upon the issuance

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<sup>928</sup> Amended Statement of Claim, ¶ 301; Aroma de la Montaña Restaurant Expansion Report, **Exhibit C-48**.

<sup>929</sup> Amended Statement of Claim, ¶ 302.

<sup>930</sup> Amended Statement of Claim, ¶ 303.

<sup>931</sup> Amended Statement of Claim, ¶ 302.

<sup>932</sup> Statement of Defense, ¶¶ 293, 309-310; Rejoinder on Jurisdiction and Merits, ¶ 341.

<sup>933</sup> Reply Memorial, ¶¶ 529-533; Diagram of Jamaca de Dios, **Exhibit C-101**; Witness Statement of Robert Webb, ¶¶ 3-4.

<sup>934</sup> Second Expert Report of Mr. Farrell, p. 17, Exhibit 1.

<sup>935</sup> Amended Statement of Claim, ¶ 305.

<sup>936</sup> Statement of Defense, ¶¶ 290, 313; Rejoinder on Jurisdiction and Merits, ¶¶ 339-340.

of the Phase 2 permit which was expected in 2011. Thus, the negotiations for Paso Alto would have been resumed if the Respondent had issued the permit.<sup>937</sup>

461. Mr. Farrell's considers that the lost profits for the Claimants, as a result of the impossibility of acquiring and developing Paso Alto, to be USD 4,233,081.<sup>938</sup>

**(e) Loss of Future Investment and Brand Diminution**

462. The Claimants explain that their brand and future investment opportunities have been negatively impacted, financially and reputational.<sup>939</sup> The Claimants reject the Respondent's argument that any losses alleged from brand diminution are "*pure conjecture*",<sup>940</sup> and state that several real estate owners had approached the Claimants enquiring as to the possibilities of developing joint ventures.<sup>941</sup> Mr. Farrell calculates that the loss of future investment and brand diminution is equal to USD 2,581,826.<sup>942</sup>

**(f) Lost Value of the Expropriated Road**

463. The Claimants claim that a private road whose construction they paid for was later made public through an expropriation.<sup>943</sup> Mr. Farrell took into account the investment and replacement costs of both phases of the road, and calculated the loss to be at USD 1,894,147.<sup>944</sup>

**(g) Prejudgment Interest**

464. The Claimants state that Mr. Farrell included an annual interest rate of 5.5%, based on the monetary policy of the Central Bank of the Dominican Republic, to be compounded monthly.<sup>945</sup>

465. The Claimants reject the Respondent's arguments in relation to interest rates and their compounding,<sup>946</sup> arguing that several of the awards raised by Mr. Hart, the Respondent's expert,

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<sup>937</sup> Reply Memorial, ¶¶ 527-528.

<sup>938</sup> Second Expert Report of Mr. Farrell, p. 17, Exhibit 1.

<sup>939</sup> Amended Statement of Claim, ¶ 307.

<sup>940</sup> Statement of Defense, ¶ 317; Rejoinder on Jurisdiction and Merits, ¶¶ 342-343.

<sup>941</sup> Reply Memorial, ¶¶ 535-538.

<sup>942</sup> Second Expert Report of Mr. Farrell, p. 17, Exhibit 1.

<sup>943</sup> Amended Statement of Claim, ¶ 308.

<sup>944</sup> Amended Statement of Claim, ¶ 309.

<sup>945</sup> Amended Statement of Claim, ¶¶ 287, 311-312; First Expert Report of Mr. Farrell, p. 8; Banco Central de la Republica Dominicana Press Release (November 30, 2016), **Exhibit C-72**.

<sup>946</sup> Statement of Defense, ¶¶ 335-336; Rejoinder on Jurisdiction and Merits, ¶ 356.

that did have a floating rate also included a political risk component which raised the ultimate interest rate applicable.<sup>947</sup>

466. The Claimants hold that interest compounded on a monthly basis is the appropriate standard to use.<sup>948</sup> The Claimants further assert that even in the awards analyzed by Mr. Hart compound interest was the method most used by tribunals.<sup>949</sup>
467. Mr. Farrell calculates the prejudgment interest, at 5.5% compounded monthly, to be equivalent to at USD 5,395,922.<sup>950</sup>

## 2. Moral Damages

468. The Claimants argue that the Respondent's acts have greatly harmed them beyond the economic damages assessed, and that the Tribunal has jurisdiction to grant them a moral damages award.<sup>951</sup>
469. The Claimants rely on the *Desert Line* award to affirm that moral damages are appropriate whenever emotional and mental anguish has been caused.<sup>952</sup> The Claimants further invoke Article 31 of the ILC Articles on State Responsibility for Internationally Wrongful Acts, and its commentary, to hold that monetary compensation would be an appropriate remedy for moral damages caused to individuals.<sup>953</sup>
470. The Claimants state that taking into account the above authorities and considering the harassment and intimidation by the Respondent that they allege having suffered, would justify the granting of the moral damages they claim.<sup>954</sup>

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<sup>947</sup> Reply Memorial, ¶ 549.

<sup>948</sup> Amended Statement of Claim, ¶ 313; Reply Memorial, ¶ 550; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award (February 6, 2007), ¶ 399, **Exhibit CLA-45**; *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award (May 11, 2009), ¶ 595, **Exhibit CLA-44**.

<sup>949</sup> Reply Memorial, ¶¶ 551-552; Study of Damages In International Center for the Settlement of Investment Disputes Cases, Table 5.1, **Exhibit R-136**.

<sup>950</sup> Second Expert Report of Mr. Farrell, p. 17, Exhibit 1.

<sup>951</sup> Amended Statement of Claim, ¶ 317; Reply Memorial, ¶ 553.

<sup>952</sup> Amended Statement of Claim, ¶¶ 320-321; Reply Memorial, ¶¶ 556-557; *Desert Line Projects LLC v Yemen*, ICSID, Case No ARB/05/17, Award (February 6, 2008), ¶¶ 289-290, **Exhibit CLA-47**; S. Wittich, 'Non-Material Damage and Monetary Reparation in International Law' (2004) 15 Finnish Yearbook of International Law pp 329-330.

<sup>953</sup> Amended Statement of Claim, ¶¶ 318-319; Reply Memorial, ¶¶ 554-555; ILC Articles on State Responsibility for Internationally Wrongful Acts, Art. 31, **Exhibit CLA-41**; ILC Commentaries (n 11) p. 252, **Exhibit CLA-42** ("compensable personal injury encompasses not only associated material losses" but also "non-material damage suffered by the individual").

<sup>954</sup> Amended Statement of Claim, ¶¶ 322-323; Reply Memorial, ¶¶ 558-559.

## B. THE RESPONDENT'S ARGUMENTS

471. The Respondent argues that the Claimants should not be awarded any damages because the quantum of their claims is speculative, unsupported by evidence, and fails to consider principles of causation, contributory fault, and mitigation.<sup>955</sup>

### 1. The Claimants Have the Burden of Proof for any Damages and They Have Failed to Show Causation

472. The Respondent affirms that in order for the Claimants to be awarded any damages (i) there must be a loss; (ii) the loss must be suffered by a claimant or its enterprise; and (iii) the loss must have been caused by the alleged breach.<sup>956</sup> The Respondent states that the Claimants have the burden of proving each of these elements.<sup>957</sup> Moreover, the damages have to be proven with a reasonable degree of certainty, and therefore, they cannot be speculative, contingent, or merely possible.<sup>958</sup>

473. The Respondent relies on the *LG&E* decision to argue that the Claimants have not identified each of the injuries caused by each of the alleged measures.<sup>959</sup> This would be an issue of causation: whether the loss alleged has been caused by the treaty violations claimed.<sup>960</sup> The Respondent adds that the causation analysis of the damages caused by expropriatory measures should differ from that of damages caused by non-expropriatory measures.<sup>961</sup>

474. The Respondent further rejects the Claimants' damages claim because the Claimants have not provided any evidence that "but for" the alleged breaches, the Jamaca de Dios' ventures would

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<sup>955</sup> Statement of Defense, ¶¶ 268-269; Rejoinder on Jurisdiction and Merits, ¶¶ 271-273.

<sup>956</sup> Statement of Defense, ¶ 273; DR-CAFTA, Art. 10.16.1.(a), 10.16.1.(b), **Exhibit R-10**.

<sup>957</sup> Statement of Defense, ¶¶ 274-275; UNCITRAL Arbitration Rules, Art. 27, **Exhibit RLA-44**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (January 12, 2011) (Nariman, Anaya, Crook), ¶ 237, **Exhibit CLA-12**; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (March 28, 2011), ¶ 155, **Exhibit RLA-38**; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (November 13, 2000), ¶ 316, **Exhibit CLA-17**.

<sup>958</sup> Statement of Defense, ¶ 276; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (September 22, 2014), ¶ 685, **Exhibit RLA-40**; *Rudloff Case (Merits)*, US-Venezuela Mixed Claims Commission, (1903-5) DC UNRIAA 255, 258-259, **Exhibit RLA-39**.

<sup>959</sup> Statement of Defense, ¶¶ 278-279; *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 25, 2007), ¶¶ 45-47, **Exhibit RLA-41**.

<sup>960</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 277-279; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (November 13, 2000), ¶ 316, **Exhibit CLA-17**; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (August 18, 2008), ¶ 468, **Exhibit RLA-113**; *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 25, 2007), ¶¶ 46-47, **Exhibit RLA-41**.

<sup>961</sup> Statement of Defense, ¶ 280; *Vivendi v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (August 20, 2007), ¶ 8.2.8, **Exhibit RLA-42**.

have been successful.<sup>962</sup> The Respondent argues that the Claimants' damages claims and calculations are unsupported: there is no relevant documentary support for the claimed historical results, and the limited market data supplied was not directly relevant.<sup>963</sup> The Respondent raises in particular the failure by Mr. Farrell, the Claimants' expert, to provide any documents or information to show the basis of his calculations.<sup>964</sup>

475. The Respondent points out that the Claimants – when contending that the Dominican Republic must compensate them for financially assessable harm – rely on authorities that require that damages be proven with a reasonable degree of certainty to be recoverable.<sup>965</sup> Yet, the Respondent states that the Claimants' damages claims are based on the speculative assumption that – “but for” the slopes or Baiguate National Park restrictions – the permit requested for Jamaca de Dios would have been granted, and the Claimants would have secured profits from various different ventures for over 25 years with only limited upfront capital investments.<sup>966</sup>

## **2. Each Head of Damages Should Be Rejected**

476. Based on the above, the Respondent considers the Claimants' allegations insufficient and falling short of the burden imposed on them. The Claimants fail to identify the causal link between the alleged breaches and the claimed damages.<sup>967</sup> Nonetheless, the Respondent also denies each head of damages in particular.<sup>968</sup>

### **(a) The Appropriateness of the Claimants' Calculation Approach**

477. According to the Respondent, DCF is not an appropriate method for assessing the quantum damages because it “*can yield an unreliable conclusion as to value when key assumptions are not*

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<sup>962</sup> Rejoinder on Jurisdiction and Merits, ¶ 284.

<sup>963</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 290-293.

<sup>964</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 294-296.

<sup>965</sup> Statement of Defense, ¶¶ 300-302; Rejoinder on Jurisdiction and Merits, ¶ 297; Amended Statement of Claim, ¶¶ 277-279; *Case Concerning The Factory at Chorzów (Case for Indemnity)(Merits)*, PCIJ Series A No. 17, Judgment No. 13 (September 13, 1928), p. 47, **Exhibit CLA-39**; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (August 30, 2000), ¶ 122, **Exhibit CLA-29**; Articles on Responsibility of States for Internationally Wrongful Acts, Art. 36, **Exhibit RLA-11**; *Rudloff Case (Merits)*, US-Venezuela Mixed Claims Commission, (1903-5) DC UNRIAA 255, pp. 258-259, **Exhibit RLA-39**; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (September 22, 2014), ¶ 685, **Exhibit RLA-40**.

<sup>966</sup> Statement of Defense, ¶ 303; Rejoinder on Jurisdiction and Merits, ¶¶ 282, 298-299.

<sup>967</sup> Statement of Defense, ¶ 283.

<sup>968</sup> Rejoinder on Jurisdiction and Merits, ¶ 273.

*well-reasoned or properly supported*.<sup>969</sup> The Respondent puts forward that tribunals generally disfavor the application of DCF when there is no principled basis for a lost profit assessment.<sup>970</sup>

478. The Respondent contends that because several of the Claimants' Projects were not going concerns,<sup>971</sup> the appropriate method would be to assess the alleged damages by reference to the investment amounts, which would reflect market value transactions.<sup>972</sup>

**(b) Lost Profits Due to Project 3 Lot Sales and Construction**

479. The Respondent holds that the Claimants are not entitled to any damages based on the alleged future sales and construction of Project 3 – called Phase 2 by the Claimants.<sup>973</sup> The Respondent states that these damages claims are speculative because the financial statements of Jamaca de Dios and the Claimants show negligible profits,<sup>974</sup> and because the Claimants had no prior experience successfully building homes for sale.<sup>975</sup>

480. In any event, the Respondent asserts that should the Tribunal grant the Claimants' request under the Project 3's lost profits head of damages, relief should be granted only with respect to the amount invested.<sup>976</sup>

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<sup>969</sup> Statement of Defense, ¶ 319; Neal Mizrahi, Compensation in Complex Construction Disputes, *Arbitration Review of the Americas* 2012, Global Arbitration Review (November 1, 2011).

<sup>970</sup> Statement of Defense, ¶¶ 319, 321; *Compañía de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (August 20, 2007), ¶ 8.3.3, 8.3.8, **Exhibit RLA-42**; *Wagih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), par. 570, **Exhibit CLA-44**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (December 8, 2000), ¶¶ 123-124, **Exhibit CLA-40**; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000), ¶¶ 121-122, **Exhibit CLA-29**.

<sup>971</sup> Statement of Defense, ¶¶ 304, 309; Rejoinder on Jurisdiction and Merits, ¶ 303.

<sup>972</sup> Statement of Defense, ¶ 320; Rejoinder on Jurisdiction and Merits, ¶ 329; First Expert Report of Mr. Hart, ¶ 63.

<sup>973</sup> Rejoinder on Jurisdiction and Merits, ¶ 303.

<sup>974</sup> Rejoinder on Jurisdiction and Merits, ¶ 304; Interim Financial Statements of Jamaca de Dios as of June 30, 2010, p. 2, **Exhibit R-98**; Jamaca de Dios Financial Statement Year 2009, **Exhibit R-199**; Jamaca de Dios Financial Statement Year 2010, **Exhibit R-200**; Jamaca de Dios Financial Statement Year 2011, **Exhibit R-201**; Jamaca de Dios Financial Statement Year 2012, **Exhibit R-202**; Jamaca de Dios Financial Statement Year 2013, **Exhibit R-203**; Jamaca de Dios Financial Statement Year 2014, **Exhibit R-204**; Jamaca de Dios Financial Statement Year 2015, **Exhibit R-205**; Jamaca de Dios Financial Statement Year 2016, **Exhibit R-206**; Jamaca de Dios Jarabacoa Tax Returns Years 2006 to 2016, **Exhibit R-208**; Ballantines' U.S. Tax Return Year 2010, **Exhibit R-244**; Ballantines' U.S. Tax Return Year 2011, **Exhibit R-245**; Ballantines' U.S. Tax Return Year 2012, **Exhibit R-246**; Ballantines' U.S. Tax Return Year 2013, **Exhibit R-247**; Ballantines' U.S. Tax Return Year 2014, **Exhibit R-248**; Second Expert Report of Mr. Hart, Appendices G.1– G.3.

<sup>975</sup> Rejoinder on Jurisdiction and Merits, ¶¶ 330-332.

<sup>976</sup> Rejoinder on Jurisdiction and Merits, ¶ 329; Second Expert Report of Mr. Hart, ¶¶ 81-85.

(c) **Expansion Costs of Aroma Restaurant**

481. Regarding the expansion of the Aroma Restaurant, the Respondent contends that the Claimants do not own or control Restaurante Aroma de la Montaña E.I.R.L. but rather it is solely owned by Ms. Rachel Ballantine, who is not a party to the dispute.<sup>977</sup> The Respondent states that the power of attorney granted to Mr. Michael Ballantine by Ms. Rachel Ballantine does not confer on him ownership rights.<sup>978</sup> Thus, since the alleged damages to the Aroma Restaurant were suffered by a third party, the Tribunal cannot award any damages in relation to it.<sup>979</sup>
482. Closely related to the Respondent's assertion that the Claimants failed to carry their burden of proof, the Respondent claims that the Claimants have not provided evidence that Aroma de la Montaña has suffered any loss.<sup>980</sup> Relying on the evidence provided by the Claimants, the Respondent concludes that Aroma de la Montaña had an exponential growth, "*almost doubling its sales between 2012 and 2013, achieving 30% and 34% increases in net income in years 2013 and 2014, and an astonishing 217% increase in net income in 2015 as compared to 2014*".<sup>981</sup> Furthermore, the Respondent submits that the restaurant has been leased to a third-party operator since June 11, 2015 through an agreement that guarantees the Claimants a USD 120,000 payment per year, which would be more than 20 times the amount it was making before the expansion.<sup>982</sup>
483. In addition, the Respondent objects to any claims based on the costs incurred in expanding Aroma de la Montaña because the vast majority of these expenses were incurred after the Claimants received the denial of the permit on September 12, 2011.<sup>983</sup> The Respondent adds that the

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<sup>977</sup> Statement of Defense, ¶ 287; Share Transfer Agreement (*Contrato de Venta Bajo Firma Privada*) (May 18, 2010), **Exhibit R-96**.

<sup>978</sup> Rejoinder on Jurisdiction and Merits, ¶ 344.

<sup>979</sup> Statement of Defense, ¶ 287; Rejoinder on Jurisdiction and Merits, ¶ 344.

<sup>980</sup> Rejoinder on Jurisdiction and Merits, ¶ 345.

<sup>981</sup> Rejoinder on Jurisdiction and Merits, ¶ 345; Second Expert Report of Mr. Hart, p. 20, Table 3; Restaurante Aroma de la Montaña S.A. Financial Statement FYE July 1, 2008, **Exhibit R-190**; Aroma de la Montaña S.A. Financial Statement FYE July 1, 2009, **Exhibit R-191**; Aroma de la Montaña S.A. Financial Statement FYE July 1, 2010, **Exhibit R-192**; Aroma de la Montaña S.A. Financial Statement FYE July 1, 2011, **Exhibit R-193**; Aroma de la Montaña S.A. Financial Statement FYE July 1, 2012, **Exhibit R-194**; Aroma de la Montaña S.A. Financial Statement FYE July 1, 2013, **Exhibit R-195**; Aroma de la Montaña S.A. Financial Statement FYE July 1, 2014, **Exhibit R-196**; Aroma de la Montaña S.A. Financial Statement FYE July 1, 2015, **Exhibit R-197**.

<sup>982</sup> Rejoinder on Jurisdiction and Merits, ¶ 346; Operating and Leasing Contract for Aroma (June 11, 2015), **Exhibit R-211**.

<sup>983</sup> Statement of Defense, ¶ 288; Rejoinder on Jurisdiction and Merits, ¶ 347; Turntable Manufacturing Contract (August 4, 2011), **Exhibit R-301**.

expansion was pursued without having obtained the permits required for it, and as an investment contrary to the laws and regulations of the Dominican Republic, it cannot be recovered.<sup>984</sup>

**(d) Lots Profits for the Mountain Lodge and the Apartment Complex**

484. Regarding the Claimants' claims for lost profits related to the planned mountain lodge and apartment complex, the Respondent notes that the Claimants have not provided any evidence of prior experience building and operating such enterprises, and that no significant work was performed in relation thereto.<sup>985</sup> Furthermore, the Respondent asserts that the Claimants did not undertake any steps to obtain a permit for the apartment complex nor did they engage the MMA with regards to the mountain lodge.<sup>986</sup>

**(e) Lost Profits Associated With the Development of the Paso Alto Project**

485. With respect to the lost profits allegedly resulting from the non-pursued Paso Alto project, the Respondent states that the option to purchase the Paso Alto project was valid until April 18, 2011.<sup>987</sup> Accordingly, the Respondent argues the Claimants' decision not to pursue this venture is unrelated to the denial of the permit, which was first notified to the Claimants on September 12, 2011.<sup>988</sup> The Respondent dismissed the Claimants' assertion that the negotiations could have been renewed and the purchase option extended, relying on the lack of documents indicating that negotiations extended beyond March 2011.<sup>989</sup> In any case, the profits from the Paso Alto project would be speculative and so they could not be subject to compensation.<sup>990</sup>

**(f) Loss of Future Investment and Brand Diminution**

486. On the Claimants' brand diminution claim, the Respondent states that these claims are based on the assumption that – “but for” the Respondent's actions – every 10 years the Claimants would

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<sup>984</sup> Rejoinder on Jurisdiction and Merits, ¶ 348; Aroma Restaurant Expansion approvals (May 2012), **Exhibit C-151**.

<sup>985</sup> Statement of Defense, ¶¶ 308-309; Rejoinder on Jurisdiction and Merits, ¶¶ 333-335.

<sup>986</sup> Statement of Defense, ¶¶ 293, 310; Rejoinder on Jurisdiction and Merits, ¶¶ 336-337.

<sup>987</sup> Statement of Defense, ¶¶ 289-290; Paso Alto Letter of Intent from Michael Joseph Ballantine to Faszinatour, S.A. (March 18, 2011), § 7, **Exhibit C-39**.

<sup>988</sup> Statement of Defense, ¶ 290; Rejoinder on Jurisdiction and Merits, ¶ 339; Letter from the MMA to M. Ballantine (September 12, 2011), **Exhibit C-8**.

<sup>989</sup> Rejoinder on Jurisdiction and Merits, ¶ 340.

<sup>990</sup> Statement of Defense, ¶ 292; Rejoinder on Jurisdiction and Merits, ¶¶ 339-340.



have acquired property elsewhere and developed additional projects similar to Project 2.<sup>991</sup> However, the Respondent notes that the Claimants merely provided the testimony of several prospective partners for possible expansion.<sup>992</sup> The Respondent affirms that had the Claimants wanted to move forward with these expansion projects, they could have done so since the Respondent did not impair their ability to do it.<sup>993</sup>

487. As to the Claimants' loss of future investment, the Respondent affirms it consists of residual earnings on the mountain lodge, the apartment complex and the hotel, and thus – similarly to any lost profits claims – considers it inappropriate to grant any damages due to lack of certainty.<sup>994</sup>

**(g) Claims Related to the Expropriated Road**

488. In relation to the Claimants' claim due to the expropriated road, the Respondent notes that the Claimants had no authorization to build the Phase 2 road and were fined accordingly.<sup>995</sup> The principle *ex turpi causa non oritur actio* would bar them from recovering damages for the Phase 2 road, which the Respondent asserts that the Claimants never built.<sup>996</sup>

489. As to the Phase 1 road, the Respondent states that it was not expropriated, but rather automatically ceded to the public domain, as happens to developments that are submitted to the process of *urbanización parcelaria* under Dominican law.<sup>997</sup> Moreover, the Respondent claims that the Claimants would have no standing to request damages for such road, since they sold off all their lots in Jamaca de Dios, and indeed would have recouped the costs of the Phase 1 road from such sales.<sup>998</sup>

**(h) Prejudgment Interest**

490. The Respondent argues that the application of an interest rate provided by the Dominican Central Bank for Dominican Pesos is not appropriate for an award requested in U.S. Dollars, and in any

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<sup>991</sup> Statement of Defense, ¶ 317; Rejoinder on Jurisdiction and Merits, ¶ 342.

<sup>992</sup> Rejoinder on Jurisdiction and Merits, ¶ 343.

<sup>993</sup> Rejoinder on Jurisdiction and Merits, ¶ 343.

<sup>994</sup> Rejoinder on Jurisdiction and Merits, ¶ 341.

<sup>995</sup> Statement of Defense, ¶ 294.

<sup>996</sup> Statement of Defense, ¶ 294; Rejoinder on Jurisdiction and Merits, ¶¶ 352-353.

<sup>997</sup> Statement of Defense, ¶ 295; Rejoinder on Jurisdiction and Merits, ¶ 351.

<sup>998</sup> Statement of Defense, ¶¶ 295-296; Rejoinder on Jurisdiction and Merits, ¶ 350.

event the 5.5% interest rate proposed by the Claimant is disproportionate compared to the interest rates ordered by other investment arbitration tribunals during the last 10 years.<sup>999</sup>

491. Moreover, the Respondent considers that an interest award compounded monthly would be unsupported, and overcompensate the Claimants.<sup>1000</sup> Mr. Hart, the Respondent's expert, explains that for monthly compounding to be appropriate a claimant must provide evidence of depositing every month all their profits in an investment vehicle returning 5.5%.<sup>1001</sup> Since such evidence has not been provided, compound interest cannot be awarded.<sup>1002</sup>

### 3. Moral Damages

492. The Respondent contends that behind the moral damages claim, the Claimants are seeking punitive damages which are not recognized under DR-CAFTA Article 10.26.3.<sup>1003</sup>

493. In any case, the Respondent states that the Claimants are not entitled to moral damages because they are only awarded in exceptional cases, and relies on the decisions of several tribunals to that effect.<sup>1004</sup> The Respondent relies in particular in the *Lemire* decision,<sup>1005</sup> which held that

[M]oral damages [are] not available to a party injured by the wrongful acts of a State, but moral damages can be awarded in exceptional cases, provided that:

[1] the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;

[2] the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position [to the claimant]; and

[3] both [the] cause and effect [of these actions] are grave or substantial.<sup>1006</sup>

494. The Respondent notes that while the Claimants allege they feared government retribution, it would be unclear what that feared retribution was, or how the harm caused by the government or

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<sup>999</sup> Statement of Defense, ¶ 335; Rejoinder on Jurisdiction and Merits, ¶ 356; First Expert Report of Mr. Hart, ¶¶ 71-75; Second Expert Report of Mr. Hart, ¶¶ 56, 58-59, 62; Credibility ICSID Damages Study (June 2014) pp. 18-20, **Exhibit R-136**.

<sup>1000</sup> Statement of Defense, ¶ 336; Rejoinder on Jurisdiction and Merits ¶ 356.

<sup>1001</sup> First Expert Report of Mr. Hart, ¶ 76; Second Expert Report of Mr. Hart, ¶¶ 56, 60-62.

<sup>1002</sup> Statement of Defense, ¶ 336; Rejoinder on Jurisdiction and Merits ¶ 356.

<sup>1003</sup> Statement of Defense, ¶¶ 338-339.

<sup>1004</sup> Statement of Defense, ¶¶ 340-341; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013), ¶ 592, **Exhibit RLA-54**; *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (September 16, 2015), ¶ 618, **Exhibit RLA-53**; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award (July 7, 2011), ¶ 282, **Exhibit RLA-55**.

<sup>1005</sup> Statement of Defense, ¶ 341.

<sup>1006</sup> *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (March 28, 2011), ¶ 333, **Exhibit RLA-38**.

its officials falls into any of the three possibilities in the *Lemire* test.<sup>1007</sup> Also, the Respondent relies on the incident with the Palo Blanco people regarding the road, to demonstrate that the police intervened in favor of the Claimants, apprehending the individuals threatening Mr. Michael Ballantine and affording him protection in the form of a restraining order, through the national courts.<sup>1008</sup>

495. The Respondent asserts that while the Claimants present themselves as victims of a Dominican government bent on boycotting their investment, in fact the Claimants attacked the Dominican Republic and its officials by using the present arbitration and negative publicity campaigns in the local media to falsely suggest that corrupt acts were committed.<sup>1009</sup>

#### 4. The Duty to Mitigate Damages

496. In addition, the Respondent states that the Claimants have contributed to, or have failed to mitigate, the losses they claim to have suffered.<sup>1010</sup> The Respondent argues that lack of mitigation or the willful or negligent contribution to the harm affect a claimant's entitlement to damages.<sup>1011</sup> The Respondent adds that the reasonable steps to be taken to reduce the loss are a question of fact, rather than of law.<sup>1012</sup>

497. The Respondent alleges that the Claimants failed to mitigate their damages and even contributed to the injury, in relation to Aroma de la Montaña's expansion,<sup>1013</sup> the continuous acquisition of land for Project 3,<sup>1014</sup> and the performance of work related to the Project 3 road.<sup>1015</sup>

498. The Respondent contends that as of September 12, 2011, the Claimants knew or should have known that they possibly would not be able to change the MMA's decision and so, they should

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<sup>1007</sup> Statement of Defense, ¶ 343.

<sup>1008</sup> Statement of Defense, ¶ 343; First Witness Statement of Michael Ballantine, ¶ 82.

<sup>1009</sup> Rejoinder on Jurisdiction and Merits, ¶ 358; Transcript of Nuria report (June 29, 2013) **Exhibit C-25**; Amended Statement of Claim, footnote 158, ¶ 147.

<sup>1010</sup> Statement of Defense, ¶ 329; Rejoinder on Jurisdiction and Merits, ¶¶ 347, 353; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (November 13, 2000), ¶ 316, **Exhibit CLA-17**.

<sup>1011</sup> Statement of Defense, ¶¶ 330-331; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission, United Nations (2001), Art. 31, Comment 11; Art. 39, Comment 2, **Exhibit RLA-84**; *Gemplus S.A., et al. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (June 16, 2010), ¶ 11.12, **Exhibit RLA-51**.

<sup>1012</sup> Statement of Defense, ¶ 330; *EDF International S.A., et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (June 11, 2012), ¶¶ 1302, 1306, **Exhibit RLA-50**.

<sup>1013</sup> Rejoinder on Jurisdiction and Merits, ¶ 347; First Expert Report of Mr. Farrell, Exhibit 2, Schedule 9.

<sup>1014</sup> Ballantines' Table of Jamaca de Dios Land Purchases, **Exhibit C-31**.

<sup>1015</sup> Statement of Defense, ¶ 332; Rejoinder on Jurisdiction and Merits, ¶ 353; Expert Report of James Farrell, Exhibit 2, Schedule 12.

have taken measures to mitigate their losses and to avoid further contributing to them.<sup>1016</sup> Accordingly, they should not recover those damages they have caused to themselves.<sup>1017</sup>

## **IX. COSTS**

### **A. THE CLAIMANTS' ARGUMENTS**

499. The Claimants state that they have incurred a total of USD 2,508,433.48 comprised of (i) USD 460,000 in arbitration costs; (ii) USD 1,424,852.70 in legal fees and expenses for its arbitration-related counsel; (iii) USD 491,898.57 in expert fees and expenses; and (iv) USD 131,682.21 in additional arbitration expenses.<sup>1018</sup>

500. Since the Claimants allege that the Respondent's officials acted in a targeted and corrupt manner with respect to the Claimants, they assert that the Tribunal should order the Respondent to pay all of the Claimants' costs and fees in this Arbitration.<sup>1019</sup>

### **B. THE RESPONDENT'S ARGUMENTS**

501. The Respondent claims that it has incurred a total of USD 3,631,570.82, and DOP 2,874,522.29 defending itself in this Arbitration, a value comprised of (i) USD 450,000.00 in arbitration costs; (ii) USD 2,611,371.56 in legal fees and expenses for its counsel; (iii) USD 562,529.26 in expert fees; and (iv) USD 7,670.00 and DOP 2,874,522.29 in other expenses.<sup>1020</sup>

502. The Respondent notes that because of the Tribunal's lack of jurisdiction with respect to the claims, their inadmissibility and lack of merit, and the Claimants litigation style and changing argumentative approaches, the Respondent's costs claims should be granted in full.<sup>1021</sup>

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<sup>1016</sup> Statement of Defense, ¶ 333; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016), ¶¶ 212-218, **Exhibit RLA-52**.

<sup>1017</sup> Statement of Defense, ¶ 333.

<sup>1018</sup> Claimants' Costs Submission, ¶¶ 1-2.

<sup>1019</sup> Reply Memorial, ¶¶ 561-562, 564.

<sup>1020</sup> Respondent's Costs Submission, ¶ 2; Respondent's Amended Costs Submission.

<sup>1021</sup> Rejoinder on Jurisdiction and Merits, ¶ 371.

**X. TRIBUNAL'S ANALYSIS ON WHETHER THE CLAIMANTS ARE INVESTORS OF A CONTRACTING PARTY AS PROVIDED BY DR-CAFTA**

503. This dispute was brought by the Ballantines, in accordance with DR-CAFTA and the UNCITRAL Rules. As to the applicable law, the Tribunal recalls that Article 35(1) of the UNCITRAL Rules establishes that “[t]he arbitral tribunal shall apply *the rules of law designated by the parties as applicable to the substance of the dispute.*” (Emphasis added)

504. In addition, DR-CAFTA Article 10.22 (“Governing Law”) indicates the following:

Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. (Emphasis added)

505. The Claimants submitted their claims under DR-CAFTA Articles 10.16.1(a) and 10.16.1(b) on their own behalf. The Claimants alleged in their Notice of Arbitration that the Respondent breached its obligations under Section A of DR-CAFTA Chapter 10.<sup>1022</sup> Therefore, pursuant to Article 10.22, the Tribunal shall base its analysis both on the DR-CAFTA and the applicable rules of international law.

**A. BURDEN OF PROOF**

506. The Tribunal notes that DR-CAFTA Chapter 10 does not contain any provision addressing the issue of the burden of proof in an investment dispute that may arise in accordance with its provisions.

507. Article 27(1) of the UNCITRAL Rules, applicable to this case, establishes that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence”. This provision embodies the principle *onus probandi actori incumbit*, which is widely recognized and applied by international tribunals.<sup>1023</sup>

508. The tribunal in *AAPL v. Sri Lanka* qualified this principle as an “*established international law rule*”, and added that “[a] Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, or proof”.<sup>1024</sup>

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<sup>1022</sup> Notice of Arbitration, ¶¶ 1, 8.

<sup>1023</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, (July 26, 2007), ¶ 121. The tribunal stated that “[t]he burden of demonstrating the impact of the state action indisputably rests on the Claimant. The principle of *onus probandi actori incumbit* – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals.”

<sup>1024</sup> *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/12, Final Award, (June 27, 1990), ¶ 56. In this case, after stating that “[t]here exists a general principle of law placing the burden of

509. At the jurisdictional level and in the context of the DR-CAFTA, the tribunal in *Pac Rim LLC v. El Salvador* considered that “*the Claimant has to prove that the Tribunal has jurisdiction*” and “*if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent*”.<sup>1025</sup> The tribunal in *Berkowitz v. Costa Rica* also expressly referred to Article 27(1) of the UNCITRAL Rules and considered that “*the accepted principle in international proceedings, at least at a level of generality, is that the burden rests in the first instance with the party advancing the proposition or adducing the evidence.*”<sup>1026</sup>
510. Thus, the Tribunal concurs with the general approach followed by other DR-CAFTA tribunals and agrees with the tribunal’s opinion in *Pac Rim LLC v. El Salvador* that “*it is not bound to accept the facts necessary to support or deny jurisdiction as alleged by the Claimant and the Respondent respectively; that the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts); and that the Respondent has the burden to prove that its positive objections to jurisdiction are well-founded.*”<sup>1027</sup>.

## **B. GENERAL STANDARD OF INTERPRETATION**

511. According to the general rule of interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“**VCLT**”), which regulates the Tribunal’s interpretative exercise, “[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.<sup>1028</sup>

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proof upon the claimant), the Tribunal explained that “[t]he term actor in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved [...] Hence, with regard to ‘proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact’ (Emphasis added).

<sup>1025</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, (June 1, 2012), ¶ 2.11, **Exhibit RLA-22**. The tribunal in *Pac Rim Cayman LLC v. El Salvador* also referred to *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* as follows: “[a]s a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed.” *Chevron v. Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, (December 1, 2008), ¶ 138.

<sup>1026</sup> *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), (May 30, 2017), ¶ 29.

<sup>1027</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, (June 1, 2012), ¶ 2.15, **Exhibit RLA-22**.

<sup>1028</sup> VCLT, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969), Article 31. Article 32 provides that recourse may be had to supplementary means of interpretation “to confirm the meaning” or to determine it when interpretation pursuant to Article 31 leaves the meaning “ambiguous or obscure” or leads to a result “manifestly absurd or unreasonable”. On the interpretation of treaties, “[a]ll three instruments are treaties under international law; and their interpretation is governed by rules of international law, expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 ... Under Article 31(1), the general rule requires a treaty to be

Therefore, the Tribunal begins its analysis with the text of two relevant provisions for the present dispute: DR-CAFTA Articles 10.16 and 10.28.

512. Article 10.16 specifies who is entitled to submit a claim to arbitration, *i.e.* the “claimant”, as well as the way in which it is entitled to do so (“*on its own behalf*” or “*on behalf of an enterprise of the respondent [...] that the claimant owns or controls directly or indirectly*”). This provision makes clear that in order to bring an investment dispute under DR-CAFTA a claimant *must exist*.<sup>1029</sup>

513. Article 10.28 defines “claimant” as “*an investor of a Party that is a party to an investment dispute with another Party*” (Emphasis added). The concept “investor of a Party” is also defined by this provision as follows:

a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality. (Emphasis added)

514. The definition comprises, in its relevant part, several requirements that must be fulfilled for a national or an enterprise to be an investor and in turn, a claimant: (i) a *national* or an *enterprise* of a DR-CAFTA Contracting Party must exist, (ii) such national or enterprise shall “*attempt[] to make, [be] making, or [have] made an investment*”, and (iii) the investment must be located “*in the territory of another*” DR-CAFTA Contracting Party (Emphasis added). The concept of “national” is particularly fundamental for the application of an investment chapter and has a bearing on the issue of jurisdiction. In cases where an individual is a dual national, DR-CAFTA Article 10.28 establishes which rule must be followed to determine the relevant nationality and consequently, whether a covered investor exists for the purpose of dispute settlement:

a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality. (Emphasis added)

515. The Parties have argued extensively their respective positions. In the Tribunal’s opinion, being the Claimants’ dual nationals of the Dominican Republic and the United States, this dispute poses two fundamental questions that inform each other: (i) what are the *relevant times* in which an individual shall comply with the nationality requirement?, and (ii) what is the legal standard under DR-CAFTA to determine *dominant and effective nationality*. The answer to both questions forms

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interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their “context” and in the light of the treaty’s “object” and “purpose””. See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, (February 8, 2005), ¶ 117.

<sup>1029</sup> DR-CAFTA Article 10.1 complements this provision, stating that Chapter 10 applies to measures adopted or maintained *by a Party* relating to: (a) *investors of another Party* and (b) *covered investments*. The term “covered investment” is defined in Article 2.1 as “an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party”. (Emphasis added).

the basis to determine if the Claimants, in the dispute before us, are covered investors under DR-CAFTA. First, we will develop both questions and then we will proceed to apply the legal standard to the facts of the case.

### 1. Relevant Times for the Compliance of the Nationality Requirement

516. The Claimants argue that, based on Article 10.28, the Tribunal “*need only look at the nationality of the Ballantines as of the time that they made their investment in the Dominican Republic.*” Moreover, they contend that they have “*at all times been dominantly and effectively U.S. citizens [...] from their birth until today.*”<sup>1030</sup> The Respondent on the other hand, considers that “*the Ballantines (who are dual nationals of the Dominican Republic and the United States) must demonstrate that, on 11 September 2014 (i.e., the date of their Notice of Arbitration and Statement of Claim), their dominant and effective nationality was their U.S. nationality.*”<sup>1031</sup> Furthermore, “*to establish that consent to arbitration exists, the Ballantines must prove that their U.S nationality was their dominant and effective nationality at the time of the alleged State conduct underlying their claims.*”<sup>1032</sup>

517. The Parties do not disagree on whether DR-CAFTA Article 10.28 and the phrase “*that attempts to make, is making, or has made an investment in the territory of another Party*” is of a disjunctive nature.<sup>1033</sup> Instead, the disagreement revolves around whether the dual-nationality requirement is relevant at one particular time, or in other words, whether it should be assessed only in relation to one of those options in order to qualify as an investor.

518. The Tribunal is of the view that, taking into consideration the rule of interpretation under the VCLT, Article 10.28 cannot be interpreted in isolation from other provisions that provide a context specific to DR-CAFTA as to whether there are relevant times in which a potential investor must comply with the nationality requirement (in the case of the present dispute, in accordance with the dual-nationality rule). As a starting point the Tribunal recalls the scope and coverage of DR-CAFTA Chapter 10, which is limited to measures related to investors of *another* Party, thus creating obligations strictly linked to that definition.<sup>1034</sup> Consequently, the term “investor” and to which Party that investor belongs is determinant for the applicability of said chapter. If there is

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<sup>1030</sup> Response to the Objection to Admissibility, ¶¶ 16, 19, 21.

<sup>1031</sup> Rejoinder on Jurisdiction and Merits, ¶ 36.

<sup>1032</sup> Rejoinder on Jurisdiction and Merits, ¶ 106.

<sup>1033</sup> Rejoinder on Jurisdiction and Merits, ¶ 42.

<sup>1034</sup> By definition, the dual-nationality rule pretends to exclude claims brought against a host State when the dominant and effective nationality of the investor is the one of the host State since in that case there would be no investment or attempt to invest in the territory of *another* Party. The term “covered investment” as defined in Article 2.1 also limits the applicability of this chapter.



no measure relating to an investor of another Party then there is no obligation and thus there can be no treaty breach.

519. We recall that the relevant provision indicates that investor of a Contracting Party *means* “*a national*” and thereafter includes the *type of actions* that may be conducted by such national. There is a distinction between both even though the two constitute elements that must be fulfilled to qualify as an investor. The phrase that follows thereafter clarifies what must be understood by *national* in the case of dual-nationality, however, the language used does not restrict the time in which the condition of nationality should be borne, *i.e.* it does not establish that investor means a national or an enterprise of a Party which bears such condition when attempting to make, making or having made an investment.
520. The terminology used in Section B of Chapter 10 provides a useful context to our interpretation that the text does not limit the nationality condition to the actions allowed in relation to an investment in order to come within the scope of Chapter 10. The section begins by referring in Article 10.15 to the terms “claimant” and “respondent”. “Claimant” is defined as “*an investor of a Party that is a party to an investment dispute with another Party.*”<sup>1035</sup> (Emphasis added) The incorporation of the specific term “investor of a Party” to the definition of “claimant” provides a *link* between what is an investor of a Contracting Party and what is consequently a claimant.
521. The fact that the necessary requirements for a natural person to be an investor of a Contracting Party (*i.e.* (i) *the existence of a national*, (ii) who has conducted a specific action (attempts to make, is making, or has made an investment), (iii) in the territory of another Party) are indeed incorporated in the definition of a claimant would logically suggest that they should be complied with *at the moment of an investment dispute*. The Tribunal observes as well that in order to be a claimant, an investment dispute must also exist.
522. The moment in which an investment dispute arises depends upon the facts and special circumstances of each case. However, DR-CAFTA Article 10.15 “Consultation and Negotiation” presumes the existence of such dispute before the submission of a claim as both parties “*should initially seek to resolve the dispute*” through those means. In any event, DR-CAFTA Article 10.16 makes clear that a claimant must exist at the moment of submission of a claim<sup>1036</sup>. In accordance

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<sup>1035</sup> “Respondent” is defined as “the Party that is a party to an investment dispute”.

<sup>1036</sup> DR-CAFTA, Art. 10.16 (*Submission of a Claim to Arbitration*), **Exhibit R-10** (“1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim [...]; and (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim[...].”).

with paragraph 4 and the UNCITRAL Arbitration Rules, this means the moment the notice of arbitration along with the statement of claim is received by the respondent.

523. DR-CAFTA Articles 10.17 and 10.18 on consent reinforce two related issues. First, consent to arbitration is provided when submission of a claim is made “*in accordance*” with the treaty. This means that the requirements examined above (such as the nationality condition) must be complied with for jurisdiction to exist upon the arbitration. Second, the three-year limit to submit a claim also provides context of the existence of another relevant time in which the nationality condition must be fulfilled, *i.e.* the date in which knowledge of the breach is or should have been acquired. This is so since, for a respondent to breach an obligation under Chapter 10, Section A, the measures adopted or maintained must relate once again to “investors” of another Party. In light of the definition for “investor of a Party”, it is clear that the measures taken by the host State should not refer to one of its nationals.
524. In the context of DR-CAFTA’s jurisprudence, the tribunal in *Pac Rim Cayman LLC v. El Salvador* considered that “*for the purpose of this Ratione Temporis issue, what CAFTA requires is not that the investor should bear the nationality of one of the Parties before its investment was made, but that such nationality should exist prior to the alleged breach of CAFTA by the other Party*” and therefore concluded that it needed to determine *the moment when the parties’ dispute arose* in order to establish if the claimant’s nationality was present at the “*relevant time*”.<sup>1037</sup>
525. The text of DR-CAFTA Article 10.28 together with the aforementioned provisions indicate that the nationality condition as part of the investor qualification is not only relevant at the moment the investment was made and therefore, such assessment should not be made only in reference to that time. Although we are also aware that other investment tribunals have addressed the principle of continuous national identity, in order to solve this matter, this Tribunal is only called upon to determine whether the Claimants qualified as investors as of the date in which the claim was submitted to arbitration as well as of the date of the alleged breach, as relevant times. The existence of an investor, *necessarily includes the nationality condition* in order for the State to have been subject to an obligation as well as for a claimant to exist.
526. The Tribunal finds instructive for its interpretation, the written submissions of other DR-CAFTA Parties pursuant to Article 10.20.2. The United States indicated that in order to submit a claim, an

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<sup>1037</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, (June 1, 2012), ¶ 3.34, **Exhibit RLA-22**. The Tribunal notes that in *Bayview Irrigation District et al. v. United Mexican States*, a NAFTA case involving a similar provision defining the term “investor of a Party”, the tribunal considered that some claimants met the nationality requirement since they were nationals of the United States and afterwards turned to the question of whether they sought to make, were making or had made an investment. *Bayview v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, (June 19, 2007), ¶ 89.

investor must be an investor of a Contracting Party other than the respondent Party. The United States further stated that “if the investor is a natural person, and that person had the dominant and effective nationality of the respondent Party at the time of submission of the claim, then the investor would not be, *at that time*, a party to a dispute with *another Party*.”<sup>1038</sup> On the other hand, Costa Rica refers in its submission to the conditions and limitations on consent and points that according to Article 10.18, “*the Tribunal, when confronted with a set of facts, will have to answer one main question: What is the date on which the claimant first acquired knowledge of the breach that is being alleged?*”<sup>1039</sup> (Emphasis in original)

527. In view of this, the Tribunal does not consider that the examination of dominant and effective nationality should be circumscribed to the moment the investment was made. The analysis of DR-CAFTA provisions referred to above indicates that compliance with this requirement is fundamental at the moment the claim was submitted, in this case, September 11, 2014 and at the moment of the alleged breach, which, according to the facts of the case and in light of Article 10.18, allegedly took place starting from 2011, when the Claimants were naturalized as Dominicans. For the Tribunal, the above critical dates provides temporal context in which the terms of Article 10.28 shall be interpreted in accordance with the VCLT.

528. Having determined the relevant times to assess the nationality of the Claimants, we proceed now to analyze the dual-nationality legal standard provided by DR-CAFTA.

## 2. Dominant and Effective Nationality Standard under DR-CAFTA

529. As analyzed in the preceding section, DR-CAFTA Article 10.28 expressly provides a rule on dual-nationality according to which a natural person “*shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality*”. Although there is no express reference made to customary international law in this provision, the inclusion of the phrase “*dominant and effective nationality*” clearly suggests the application of a concept that has been used in the context of customary international law.<sup>1040</sup> However, before addressing the specific issue before us, the

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<sup>1038</sup> Submission of the United States, ¶ 3. The United States also indicates that “the claimant also must be “an investor of a Party” other than the respondent Party at the time of the purported breach [...] Where the requisite nationality does not exist at the operative times set out above, the respondent Party has not consented to the submission of a claim to arbitration at the outset, and the tribunal therefore lacks jurisdiction *ab initio* under Article 10.17”. It also refers to Article 10.18.1 and its view that “a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period”. See Submission of the United States, ¶¶ 4-5, 8; and Article 10.1 of DR-CAFTA.

<sup>1039</sup> Submission of the Republic of Costa Rica, ¶¶ 3-10.

<sup>1040</sup> The Tribunal notes that both Parties made reference to the pertinence of international law and the standard developed in such context for the interpretation of “dominant and effective” nationality. Request for Bifurcation, ¶ 12; Response to the Request for Bifurcation, ¶ 22.

Tribunal considers important to make certain preliminary observations regarding the circumstances of this case.

**(a) Preliminary Considerations**

530. At the outset, the Tribunal notes that this is a case of first impression related to dual-nationality provisions in the context of DR-CAFTA. *First*, the relevant provision seems to presuppose that in cases of dual-nationality there will be one that will be dominant and effective over the other, *i.e.*, ultimately there will be one answer. *Second*, the language used allows dual-nationality and claims by dual nationals so long as their dominant and effective nationality is not that of the host State. This is confirmed by the inclusion of the phrases: “*another Party*” as well as “*deemed to be exclusively*” in conjunction with the adjectives “*dominant and effective*”. *Third*, the treaty does not prescribe the factors that may be considered to determine dominance and effectiveness. *Fourth*, the Tribunal should take guidance from customary international law, taking into account Article 10.28 particular context, within DR-CAFTA’s general object and purpose. This follows from Article 10.22 providing that: “*the Tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*”. (Emphasis added) In turn, this necessarily entails first, giving effect to the specific context provided for in this instrument as well as its object and purpose; second, giving effect to the customary rules of international law “*as an applicable rule of international law*”.
531. On this matter, the Tribunal deems appropriate to make certain observations. Unlike substantive provisions such as, Articles 10.5 (Minimum Standard of Treatment), 10.6 (Treatment in Case of Strife) or 10.7.1 (Expropriation)<sup>1041</sup>, which contain an express reference to customary international law, the definition in Article 10.28 does not contain such a reference. Nevertheless, the Tribunal has no doubt that the expression “dominant and effective” is rooted on customary international law.
532. The Tribunal notes that the Parties have extensively argued on the application of the dominant and effective standard under customary international law. On one hand, the Claimants indicated that: “CAFTA-DR does not provide a defined test”, “reference to international law is appropriate to aid the Tribunal’s evaluation of this issue” and that “decisions of the US-Iran Claims Tribunal provide guidance in describing factors that may be considered in evaluating which of two nationalities should be deemed ‘dominant’.”<sup>1042</sup> (Emphasis added) The Claimants also stated that: “the decisions from the US-Claims Tribunal [...] relate to an entirely different set of circumstances”

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<sup>1041</sup> See DR-CAFTA, Annexes 10-B and 10-C.

<sup>1042</sup> Response to the Request for Bifurcation, ¶ 22.

*and arise under an entirely different treaty [...] [a]lthough the [Iran-]U.S. Claims Tribunal cases are [sic] instructive and can be a guide in some parts, these cases do not obviously control or provide a precedent in this case. Thus, given the absence of examination of this issue under CAFTA-DR by other tribunals, this is essentially a case of first impression”.*<sup>1043</sup> (Emphasis added) On the other hand, the Respondent has argued that “*the Tribunal must assess ‘applicable rules of international law’ since DR-CAFTA does not articulate any standard for determining the dominant and effective nationality”*<sup>1044</sup> (Emphasis added). Neither of the other DR-CAFTA Parties provided its views to the Tribunal on this issue.

533. Moreover, the inclusion of this phrase on an investment chapter within the broader framework of a Free Trade Agreement imbues that phrase with a specific meaning. Analyzing the terms of Article 10.28 without consideration of the context that surrounds it would imply disregarding the general rule of interpretation that we must apply under the VCLT. The Tribunal considers that the factors developed under customary international law cases are instructive, although such factors reflect an interpretation developed in a specific period of time and under different circumstances from the ones present in this case, *i.e.* a dual nationality case related to investment protection provided for in a specific treaty, *i.e.* DR-CAFTA. In view of this, and while we do take due consideration of the factors analyzed in prior cases, the Tribunal deems it appropriate to give specific meaning to the terms used in DR-CAFTA rather than directly incorporating any other standard, which would disregard the rules of interpretation that we are bound to apply under the VCLT.
534. Finally, this case presents a unique fact pattern. Usually, when dealing with nationality issues, investment tribunals are confronted with the question of whether an investor acquired nationality in order to gain access and protection through a treaty. However, this case deals with the question of whether the Claimants – who acquired in addition to their U.S. nationality, the citizenship of the host State before submitting their claim – “lost” their right to access this mechanism because they were dominant and effective nationals of the respondent State at the time of the alleged breach and the submission of their claim.

**(b) The Meaning of Dominant and Effective under DR-CAFTA**

535. According to the rule of treaty interpretation established in the VCLT, we begin our analysis with the text of DR-CAFTA Article 10.28. This provision qualifies the word “nationality” by virtue of the adjectives “dominant” and “effective”. The use of the connector “and” would indicate that a

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<sup>1043</sup> Reply Memorial, ¶¶ 22-23.

<sup>1044</sup> Request for Bifurcation, ¶ 12.

nationality has to be both dominant and effective for a natural person to qualify as an investor of a Contracting Party. The meaning of the word “dominant” means “*commanding, controlling, or prevailing over all others; very important, powerful, or successful; overlooking and commanding from a superior position; of, relating to, or exerting ecological or genetic dominance; being the one of a pair of bodily structures that is the more effective or predominant in action.*”<sup>1045</sup> The meaning of the word “effective” means “*producing a decided, decisive, or desired effect; impressive, striking; being in effect: operative; actual; ready for service or action.*”<sup>1046</sup> In addition, “nationality” is defined as “*national character*”; “*national status specifically: a legal relationship involving allegiance on the part of an individual and usually protection on the part of the state; membership in a particular nation*”.<sup>1047</sup>

536. The Claimants have referred to “strength”<sup>1048</sup>, “connections” and “closeness” within the context of the determination of dominant and effective nationality.<sup>1049</sup> Although they refer to the dominant and effective determination, the Claimants’ arguments seem to focus on the concept of dominance and do not provide clear argumentation on whether these concepts are different or should be understood as the same.<sup>1050</sup> The Respondent has indicated that “effective nationality” refers to “*whether there is a genuine connection between a person and each State of nationality*” and that such an issue is not in play since “*the Dominican Republic does not dispute the Ballantines have a genuine connection with the United States, and there should be no question (given the factors discussed below) that the Ballantines also have a genuine connection to the Dominican*

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<sup>1045</sup> “dominant”. *Merriam-Webster.com*. 2019. <https://www.merriam-webster.com>. (March 22, 2019). *See also*, “dominante”. *Diccionario de la Real Academia Española*. 2019. <https://dle.rae.es/> (July 10, 2019).

<sup>1046</sup> “effective”. *Merriam-Webster.com*. 2019. <https://www.merriam-webster.com>. (March 22, 2019). *See also*, “efectivo”. *Diccionario de la Real Academia Española*. 2019. <https://dle.rae.es/> (July 10, 2019).

<sup>1047</sup> “nationality”. *Merriam-Webster.com*. 2019. <https://www.merriam-webster.com>. (March 22, 2019). *See also*, “nacionalidad”. *Diccionario de la Real Academia Española*. 2019. <https://dle.rae.es/> (July 10, 2019).

<sup>1048</sup> “strongest personal and professional relationships”. Amended Statement of Claim, ¶ 154.

<sup>1049</sup> “closely aligned”. Response to the Request for Bifurcation, ¶ 23; Reply Memorial, ¶¶ 35-36; Rejoinder on Jurisdiction and Admissibility, ¶¶ 32, 48, 51, 90.

<sup>1050</sup> In their Reply Submission, section B refers to “factors for determining dominant nationality”, ¶ 12. In the Rejoinder they make references such as “the dominant nationality “test” established in DR-CAFTA”; “*What is not in dispute* is that the Ballantines at no time severed their dominant cultural attachment to the United States”, “A full spectrum review of relevant factors reveals the Ballantines’ continuing and dominant US nationality”; “The Ballantines have never considered themselves dominantly Dominican”; “Tribunals have made clear that it is important to look at a claimant’s *entire life* in evaluating its truly dominant nationality”; “...whether or not this Tribunal should deem the Ballantines to be predominantly U.S. nationals or predominantly Dominican”; “The Ballantines have at all times been dominantly U.S. citizens”, ¶¶ 3-5, 10, 18.” In their Rejoinder, section C is titled “Appropriate Time Frame for Evaluation of the Ballantines’ Dominant Nationality”; section D is titled “This Tribunal Can Consider a Broad Spectrum of Social, Cultural, Family and Economic Factors in Determining Dominant Nationality”. The Tribunal bears in mind that during the hearing, Mr. Baldwin indicated that in his view “dominant and effective are two different things [a]nd here both have to be satisfied”. Hearing Transcript, Day 1, 97 (English).

*Republic*".<sup>1051</sup> Moreover, the Respondent has asserted that "dominant nationality" is a question of "which connection is stronger" or with which country the Claimants are more closely aligned.<sup>1052</sup>

537. DR-CAFTA Article 10.28 presupposes the existence of a bond between a natural person and two countries by virtue of the nationality each one has bestowed upon such individual, *i.e.* the existence of that connection is not doubted, it exists. However, for a claimant to be considered as such, that connection to the non-host State must be of a certain type: it must be dominant and effective.
538. The Tribunal agrees that the word "dominant" conveys the notion of strength and precedence of one thing over another and that closeness between an individual and a State can indicate such attributes. In turn, closeness with a State and the strength of a nationality bond, could be the result of several factors in play such as the time spent by the individual in that country, family and personal attachments, language, education, work, economic or financial attachments, *i.e.* a cluster of elements that make up the life of an individual and that define several connections to a particular State. We understand "dominance" as referring to the degree or magnitude in which such connections are stronger than the connections that could have also been built by the individual in relation to another State that has also bestowed its nationality.
539. The word "effective" on the other hand seems to refer to something that produces a specific effect, something that is actually operative or functioning. We understand this concept as requiring this nationality bond to go beyond a formality with no apparent further effect, to be of substance rather than merely declaratory. An individual can possess a second nationality but this would not necessarily mean that such nationality is effective if, for instance, it has never been exercised; if the individual has never presented himself or herself as a national of that country; if he or she never visited that country; if he or she holds no personal or professional connection to that country; or if he or she has never complied with obligations or exercised rights as national of that country. There must be significance in the fact that Article 10.28 does not simply require nationality to exist, it requires that nationality complies with two specific qualities that should be different from the existence of that legal bond.
540. This does not necessarily imply that the legal standard to assess dominance and effectiveness should be different or that criteria used to determine if nationality is dominant would be useless to determine effectiveness. According to the text, the standard is one: "dominant and effective nationality" and in order to comply with it those two elements must be met. For example, an individual may hold two nationalities with only one being dominant and effective in view of the

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<sup>1051</sup> Statement of Defense, ¶ 27.

<sup>1052</sup> Statement of Defense, ¶ 28.

fact that the second one has never been exercised or been operational. There could be other cases in which both nationalities are effective if the individual exercises both of them, presents himself or herself as national of both countries, complies with both sets of obligations. However only one of them has to be strong enough so as to take precedence over the legal bond of that same individual with the other country. It does not seem to be a matter of extinguishing one bond in favor of another. This is what makes the assessment of determining which nationality is “dominant and effective” more challenging.

541. Given the fact that Article 10.28 does not provide more guidance for interpreting the meaning of “dominant and effective” nor on the criteria for such an analysis, the Tribunal, in conformity with Article 10.22 of DR-CAFTA and Article 31.3(c) of the VCLT, will also explore customary international law as “*other relevant rules of international law applicable in the relations between the Parties*”.

### (c) Dominance and Effectiveness in the Context of Customary International Law

542. In the area of investment disputes, customary international law on dual-nationality has been touched upon but the Tribunal considers that such precedents are distinguishable to the case before us, either because (i) the relevant provision was different than the one contained in DR-CAFTA<sup>1053</sup> or (ii) the factual scenario was different,<sup>1054</sup> or (iii) both.<sup>1055</sup>

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<sup>1053</sup> *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, (October 21, 2003), Section 3.4.1, pp.9 -17. The tribunal was faced with the absolute bar on claims from dual-nationals contained in Article 25(2)(a) of the ICSID Convention. However, this case is not based on a bar on claims from dual-nationals but on dual-nationality itself.

<sup>1054</sup> *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, (July 26, 2001), ¶¶ 60-61. This case presents different features since Mr. Olguín’s nationalities were of a country not Party to the BIT and a Party that was not the Respondent State: The claimant possessed dual-nationality, however, access to arbitral jurisdiction rested on nationality and not on its dominance and effectiveness. Moreover, none of Mr. Olguín’s nationalities were that of the host or respondent State.

<sup>1055</sup> *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, UNCITRAL, PCA Case No. 2013-3, Decision on Jurisdiction, (December 15, 2014), ¶¶ 173-175. (Available in Spanish). In the absence of an explicit rule in the BIT on dual nationality, the tribunal rejected the application of customary international rules on diplomatic protection to BIT’s in general and to the specific BIT at issue, and thus rejected the application of the dominant and effective nationality test. This award was partially annulled by the Paris Court for lack of jurisdiction *ratione materiae*. However, the Paris Court held that the tribunal had jurisdiction *ratione personae* since the BIT and the applicable UNCITRAL rules did not prevent Spanish-Venezuelan bi-nationals from bringing an action against one of their States of origin (*Serafín García Armas and Karina García Gruber v. Venezuela*, Decision of the Paris Court of Appeal on the Set Aside Application, (April 25, 2017), p. 9.) (Available in French).

See [https://www.transnational-dispute-management.com/downloads/19597\\_case\\_report\\_venezuela\\_v\\_armas-gruber\\_2017.pdf](https://www.transnational-dispute-management.com/downloads/19597_case_report_venezuela_v_armas-gruber_2017.pdf) and IA Reporter, *Paris court partly annuls jurisdictional award in dual-national claim against Venezuela*, April 26, 2017, <https://www.iareporter.com/articles/paris-court-partly-annuls-jurisdictional-award-in-dual-national-claim-against-venezuela/>. The Paris Court decision was subsequently vacated by the Court of Cassation, and the case was remanded for further reconsideration.



543. Recently, the tribunal in *David R. Aven v. Costa Rica* considered the text of Article 10.28 of DR-CAFTA in the context of its determination of whether the nationality of a dual citizen (of one of the signatories to the DR-CAFTA) was “effective”, as well as his purpose for initially representing himself as Italian.<sup>1056</sup> However, that tribunal expressly stated that the fact pattern in that case “[did] not trigger Article 10.28’s mechanism for dealing with dual nationals”<sup>1057</sup>, due to the fact that the dispute did not involve, as in our case, a claimant who possessed nationalities of two Contracting Parties to DR-CAFTA.
544. Although, as mentioned above, dual-nationality has been addressed in the context of investment arbitration, the Tribunal does not find support as to the meaning of “dominant and effective” nationality that would allow us to use such precedents as guidance for the dispute before us.
545. Regarding customary international law and, specifically, in the context of diplomatic protection, dual-nationality was addressed by the ICJ in the *Nottebohm Case*, even though the case itself did not deal with dual-nationality. That case does not use the terminology “dominant and effective” nationality as Article 10.28 of DR-CAFTA but “*real and effective*”. The main question to be decided in *Nottebohm* was whether the nationality granted to an individual by one State was binding or enforceable *vis a vis* a third State, in the context of diplomatic protection.<sup>1058</sup> *Nottebohm* does not deal with the concept of “dominant nationality”. Nevertheless, the ICJ reference to certain principles as applied by arbitrators “*for determining whether full international effect was to be attributed to the nationality invoked*”<sup>1059</sup>, which were lately recognized by international tribunals as relevant criteria to decide dual nationality issues.
546. In addition, the Italian – United States Conciliation Commission, in the *Mergé* case, referred to “the principle of effective” as “dominant nationality” and seemed to equate both concepts while stating “*effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case*”.<sup>1060</sup> On its part, the Iran – United States Claims Tribunal, in dealing with dominant and effective nationality expressed that: “*the relevant rule of international law which the Tribunal may take into account*

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<sup>1056</sup> This case concerned a dual citizen of the United States (a Contracting Party to DR-CAFTA) and of Italy.

<sup>1057</sup> *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, (September 18, 2018), ¶ 215. The tribunal in *Aven* did not dissect and apply Article 10.28. However, it did apply directly the *Nottebohm* test as it considered it incorporated by reference. For the reasons already expressed, this Tribunal disagrees to the extent this suggests that the same test directly applies to Article 10.28.

<sup>1058</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment, (April 6, 1955), p. 24, **Exhibit RLA-6**.

<sup>1059</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment, (April 6, 1955), p. 22, **Exhibit RLA-6**.

<sup>1060</sup> *Mergé Case*, Italian-United States Conciliation Commission, Decision No. 55, (June 10, 1955), pp. 246-247, **Exhibit RLA-7**.

[...] is the rule that flows from the dictum of *Nottebohm*, the rule of real and effective nationality, and the search for ‘stronger factual ties between the person concerned and one of the States whose nationality was involved’”.<sup>1061</sup>

547. The Tribunal is persuaded that customary international law has developed and crystalized relevant factors to determine, in cases dealing with dual nationality, which is the dominant and effective one. Next, the Tribunal will deal with those factors.

**(d) Factors to be Considered in Assessing “Dominant and Effective” Nationality**

548. As to the criteria developed by other tribunals to assess dual nationality cases<sup>1062</sup>, the ICJ recognized that:

“[d]ifferent factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”<sup>1063</sup>  
(Emphasis added)

549. The Court also recognized that these elements do not constitute an exhaustive list of factors. In the same vein, in the *Mergé* case, the Italian - United States Conciliation Commission stated: “[i]n order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as closer and more effective bond with one of the two states must be considered”.<sup>1064</sup>

550. Following the above precedents, the Iran – United States Claims Commission decided that “in determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.”<sup>1065</sup>

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<sup>1061</sup> *Case No. A/18*, IUSCT Case No. A/18, Decision No. DEC 32-A18-FT, (April 6, 1984), p. 12, **Exhibit RLA-8**.

<sup>1062</sup> *Nottebohm* does not concern dual nationality, but the Court recognized that “International arbitrators have decided in the same way numerous cases of dual nationality”, *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 22, **Exhibit RLA-6**.

<sup>1063</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment, (April 6, 1955), p. 22, **Exhibit RLA-6**. The Iran-U.S. Claims Tribunal also made reference to these factors as relevant although it stated that it would consider “all relevant factors”. *Case No. A/18*, IUSCT Case No. A/18, Decision No. DEC 32-A18-FT, (April 6, 1984), p. 12, **Exhibit RLA-8**.

<sup>1064</sup> *Mergé Case*, Italian-United States Conciliation Commission, Decision No. 55, (June 10, 1955), p. 247, **Exhibit RLA-7**.

<sup>1065</sup> *Case No. A/18*, IUSCT Case No. A/18, Decision No. DEC 32-A18-FT, (April 6, 1984), p. 12, **Exhibit RLA-8**.

551. In reference to the critical dates in which dominant and effective nationality should be assessed, the Italian – United States Commission has determined that “[t]he question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred and during the whole period comprised between the date of the Armistice (September 3, 1943) and the date of the coming into force of the Treaty of Peace (September 15, 1947)”<sup>1066</sup> The Iran – United States Claims Commission has adopted identical criteria concerning relevant factors to be considered from the date in which the claim arose and January 19, 1981.<sup>1067</sup>
552. Overall, the decisions referred above indicate the need to examine the *connections* and the *closeness* of the bond that an individual has with two countries by virtue of the nationalities held at a pre-determined relevant time. As indicated in Procedural Order No. 2, we consider “*the State of habitual residence, the circumstances in which the second nationality was acquired, the individual’s personal attachment for a particular country, and the center of the person’s economic, social and family life*” as relevant for our analysis.<sup>1068</sup> Such elements seem to be pertinent to discern both dominance and effectiveness.

**(e) The Specific Context of DR-CAFTA for the “Dominant and Effective Nationality” Test**

553. Chapter 10 of DR-CAFTA protects “investments” and “investors” by providing standards of treatment and allowing recourse in cases of breach by the host State. Its scope is limited to both *fundamental concepts*.<sup>1069</sup> “Substantially increasing investment opportunities in the territories of the Parties” is one of the objectives of DR-CAFTA, this is reinforced by the resolve stated by the Parties in the Preamble to “[e]nsure a predictable commercial framework for business planning and investment”. The fact that the application of Chapter 10 and the obligations enshrined therein depend on the existence of “investors” and “covered investments”, and in particular, on nationality in order to possess the condition of an investor has great meaning. Nationality (and in the case of dual nationals, dominant and effective nationality) is *interrelated* to the concept of

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<sup>1066</sup> *Mergé Case*, Italian-United States Conciliation Commission, Decision No. 55, (June 10, 1955), p. 247, **Exhibit RLA-7**; The Franco – Italian Conciliation Commission also decided several claims of dual nationals according to the “link theory”: *Rambaldi Calim* (France v. Italy) 13 R.I.A.A. 786 (1957); *Menghi Claim* (France v. Italy) 13 R.I.A.A. 801 (1958); *Lombroso Claim* (France v. Italy) 13 R.I.A.A. 804 (1958).

<sup>1067</sup> *Case No. A/18*, IUSCT Case No. A/18, Decision No. DEC 32-A18-FT, (April 6, 1984), p. 12, **Exhibit RLA-8**.

<sup>1068</sup> Procedural Order No. 2, p. 7.

<sup>1069</sup> See Article 10.1 on Scope and Coverage as well as sections A and B.

investor. There will be no investor within the meaning of Chapter 10 if there is no (dominant and effective) foreign national.

554. In this regard, the Tribunal considers that the *investment* itself, the status of *investor* as well as other circumstances surrounding those elements may be relevant factors for assessing nationality and its dominance and effectiveness within Article 10.28 of DR-CAFTA. A tribunal may need to examine any factor that may help discern those attributes, for example, the conduct of a particular State towards the investor, how the investor presented himself or herself, or the reason underlying the investor's decision to apply for naturalization.
555. The Tribunal is of the view that a claimant's entire life is relevant but not dispositive when assessing whether nationality is dominant and effective.<sup>1070</sup> In cases dealing with double nationality (with one acquired after the other), it would most likely be evident that a person that was born and lived in a particular country during a long period of his or her life will have many attachments, connections and closeness with that country.
556. For these reasons, a holistic assessment must be performed in order to discern which nationality was dominant and effective at the relevant time considering all the facts of the case. Taking into account a claimant's entire life within the analysis of dominance and effectiveness *at a particular time* does not necessarily entail ascribing more weight to one nationality over the other due to the amount of time each of them has been held. Rather an analysis should be performed to examine how, *at that particular time*, the connections to both States could be characterized in terms of dominance and effectiveness.
557. According to Article 10.28 of DR-CAFTA, the Tribunal must then determine if at the time of the alleged breach and ultimately at the time of the submission of the claim, the Claimants' U.S nationality was dominant and effective or if their Dominican nationality fulfilled those attributes, *i.e.* if it was strong enough to take precedence over their U.S. nationality and it was producing effects or was operative during the relevant time in order to determine whether they were investors under DR-CAFTA.

### C. APPLICATION OF THE LEGAL STANDARD TO THE FACTS OF THE CASE

558. The Claimants have argued that they qualified as investors at the moment of the submission of the claim since they were at all times dominantly and effectively U.S citizens "*from their birth until today*".<sup>1071</sup> Overall, the Claimants have taken into account the following factors in support of their contention: (i) the center of gravity of their contacts, relationships, and commitments, (ii)

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<sup>1070</sup> *Reza Said Malek v. Iran*, IUSCT, Interlocutory Award, (June 23, 1988), ¶ 14, **Exhibit CLA-51**.

<sup>1071</sup> Reply Memorial, ¶ 21.

their place of birth, (iii) the place where the majority of their lives was spent, (iv) the place of their permanent residence, (v) their personal and professional relationships and (vi) the origin of the capital for their investment.<sup>1072</sup> In the Tribunal's opinion, none of those factors exclusively indicate that a particular nationality was dominant and effective. On the contrary and as mentioned above, a *holistic exercise* must be performed in order to discern whether all the relevant factors analyzed indicate that a specific nationality was effective<sup>1073</sup> (*i.e.* actually operative and producing effects) as well as dominant (strong enough to take precedence over the other). Although the factors related to the life of the Claimants before they moved and invested in the Dominican Republic are relevant, they should be analyzed with a view to determining their connection with the Dominican Republic and the United States at the relevant times.

559. The Tribunal considers that the factors mentioned by the Parties can be analyzed within the criteria indicated in Procedural Order No. 2, *i.e.* (a) habitual residence, (b) the individual's personal attachment for a particular country, (c) the center of the person's economic, social and family life, and (d) the circumstances in which the second nationality was acquired, bearing in mind the specific context of this dispute. Additionally, we are called upon to examine the nationality of each Claimant, Mr. and Ms. Ballantine. While the evaluation must be made in relation to each of them, the Tribunal considers that it can be addressed in the specific section of each criterion making the distinction when necessary. We turn now to our examination of the criteria mentioned above in light of the facts of the case.

### 1. Habitual Residence

560. Within this factor, the Tribunal addresses some criteria which the Parties have discussed in their submissions and that relate to each other: In particular: (i) the place of birth, (ii) the place where the majority of the Claimants' lives were spent, and (iii) permanent residence. The Tribunal observes that this factor was considered as an "*important factor*"<sup>1074</sup> in *Nottebohm*, and that while weighing the connections with Liechtenstein, the ICJ considered, among other circumstances, that

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<sup>1072</sup> Notice of Arbitration, ¶ 21; Amended Statement of Claim, ¶¶ 154-155.

<sup>1073</sup> The Tribunal observes that the Respondent does not contest the effectiveness of the Claimants' U.S. nationality when indicating that "[they] have genuine connections to both States." Rejoinder of the Dominican Republic on Jurisdiction and Merits, ¶ 44. *See also* Statement of Defense, ¶ 27.

<sup>1074</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 22, **Exhibit RLA-6**. In that case, the tribunal indicated the relevance of other factors and stressed that their importance would vary from one case to the other.

there had been “*no prolonged residence in that country*” and “[n]o intention of settling there was shown”.<sup>1075</sup>

561. Place of birth. The place of birth is not contested. The Claimants were born in the United States. We note that this factor relates to others put forward by the Claimants in order to indicate that their closeness to the U.S. was stronger when submitting their claim. We see nothing that would indicate that, particularly in cases involving acquired double nationality, this factor has a special bearing over other factors in order to determine which nationality is dominant and effective at any critical date.
562. Place where the majority of their lives was spent. The Claimants were born in the United States. They also lived in the Dominican Republic for a year in 2000 while working as missionaries and continued to visit the country each year after they returned to the United States in 2001<sup>1076</sup>; afterwards, they moved to the Dominican Republic in August 2006.<sup>1077</sup> From 2006 to the moment the claim was submitted, the Ballantines lived in the Dominican Republic. While this represents a significant period of time, overall, the Claimants had spent up to that moment the majority of their lives in the United States. The Tribunal considers that the fact that the Claimants spent the majority of their lives in the U.S. evidences that such nationality was exercised. The Tribunal is also aware that during that time span the Claimants created significant connections as a natural consequence of living in their county of birth, connections related to their way of living, personal and professional as well as economic. However, the determination of “dominant and effective” may not be reduced to a mathematical “day counting” exercise. A further examination is required in order to conclude that such connections remained stronger, at a particular relevant point in time.
563. Place of permanent residence. The Claimants moved to the Dominican Republic in August 2006. The Tribunal notes that, initially, the Claimants characterized such move as “permanent”.<sup>1078</sup> According to the witness statement of Ms. Ballantine, the Claimants sold two of their homes and commercial real estate in the United States.<sup>1079</sup> The Claimants were permanent residents since 2006, however, Mr. Ballantine testified at the hearing that he was first a temporary resident and that by 2008 both he and his wife were permanent residents.<sup>1080</sup> Regardless of this discrepancy,

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<sup>1075</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 25, **Exhibit RLA-6**.

<sup>1076</sup> Amended Statement of Claim, ¶ 20.

<sup>1077</sup> Second Witness Statement of Lisa Ballantine, ¶¶ 1-3; First Witness Statement of Michael Ballantine, ¶¶ 3, 4, 17.

<sup>1078</sup> Notice of Intent, ¶ 12.

<sup>1079</sup> First Witness Statement of Lisa Ballantine, ¶ 3.

<sup>1080</sup> This declaration arose in relation to Exhibit R-25 which contains permanent residence certificates of Mr. and Ms. Ballantine indicating such status since 2006 and renewed in 2008. Hearing Transcript, Day 2, 477 (English).

the stream of events not only reflects a change in residence made by the Claimants, but also a change in the *status* of such residence to legally reflect *permanency*. The Tribunal views a permanent residence as a decision to settle in a specific place, as a long-standing decision.

564. The Claimants have argued that they continuously maintained at least one residence and sometimes two in the United States.<sup>1081</sup> It seems clear to the Tribunal that during the period of time that the Claimants lived in the Dominican Republic there was no attempt to renounce completely to residential connections in the United States since a fair amount of time was also spent in such country. Nevertheless, this standard does not seem to require renouncement of one nationality over the other. This does suggest however that the Claimants continued maintaining connections to the United States despite their permanent residence being officially in the Dominican Republic.
565. As to the amount of time spent in each country, Mr. Ballantine clarified in his witness statement the number of days that Ms. Ballantine spent outside the Dominican Republic from 2010 to 2014 and from those days how many were spent in the U.S. From this examination, it seems that in 2010 and 2011 most of Ms. Ballantine's days were spent in the United States while in 2012, 2013 and 2014 she spent more days in the Dominican Republic. Overall, the majority of her days between 2010 and 2014 were spent in the Dominican Republic. On the other hand, Mr. Ballantine indicated that he "*travelled just slightly less [...] but he joined [Lisa] on almost every return to the United States*".<sup>1082</sup> We consider that if Mr. Ballantine travelled less, then most likely he would have spent at least the same amount of days in the Dominican Republic as Ms. Ballantine over the same period.

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Exhibit R-16 also contains a sworn statement indicating the Claimants' residence in the Dominican Republic. The Tribunal notes as well that according to the Digest of United States Practice in International Law 1991-1999, published by the International Law Institute under agreement with the United States Department of State, Office of the Legal Adviser, residence and other voluntary associations are important factors for the "dominant and effective" nationality determination: "These tests should be used to determine the dominant, effective nationality of the applicant in question. The primary question to be asked is what nationality is indicated by the applicant's residence or other voluntary associations. A second question is whether the applicant has manifested an intention to be a national of one of the two States, while also seeking to avoid or terminate nationality in the other. Of these two questions, the former will ordinarily be the more important". (Emphasis added), **Exhibit RLA-10**, p. 36.

<sup>1081</sup> Reply Memorial, ¶ 37.

<sup>1082</sup> Supplemental Witness Statement of Michael Ballantine, ¶ 21. According to this information, in 2010 Ms. Ballantine spent 101 days in the Dominican Republic, 145 days in the United States and 119 in other places. In 2011 she spent a close amount of days both in the Dominican Republic and in the United States, 159 in the former and 162 in the latter, as well as 44 days in other places. In 2012, she spent 192 days in the Dominican Republic, 98 days in the United States and 75 days in other places. In 2013 she spent 238 days in the Dominican Republic and 127 in the United States. In 2014 she spent 213 days in the Dominican Republic, 109 in the United States and 43 days in other places.

566. Although the number of days spent in each country may confirm that the Claimants split significant amounts of time between two countries and consequently resided at times in both countries, their legal status, at least from 2008 until the moment they became Dominican nationals in 2010<sup>1083</sup> was as *permanent residents* of the Dominican Republic and being nationals from 2010 to 2014, most of their time was spent in that country. We view this evidence as confirming the legal status the Claimants voluntarily chose to acquire. Consequently, although the Claimants maintained ties with the United States, their permanent residence at the relevant time was centered in the Dominican Republic.

## 2. The Individual's Personal Attachment for a Particular Country

567. Personal and professional relationships. As mentioned above, the Tribunal is aware that the majority of the Claimants' lives was spent in the United States, which consequently would entail deep connections of different types. The Claimants argue that certain factors such as education or religion should be taken into account in order to determine that their dominant and effective nationality was of the United States.<sup>1084</sup>

568. The Claimants were educated in the United States. They further argue that although two of their children attended school in Jarabacoa, they did so at an American school. The Tribunal does not view the fact that the Claimants' children attended a school in Jarabacoa as a fact necessarily indicating that the Claimants' dominant and effective nationality was Dominican.<sup>1085</sup> This would seem to be a decision logically derived from the fact that the Claimants' residence changed. The fact that the school their children attended was American could indicate their intention to maintain their children closer to the U.S. in terms of language, education and relations within the new community they were already integrating to. Mr. Ballantine has asserted that their children "*attended an American school [...] The classes are taught predominantly in English by United States citizen teachers. All of our children have primarily pursued their education in the United States*" and Ms. Ballantine has indicated that "*we [...] enrolled our children in the new American school. This would give us the opportunity to work there and to give the kids consistency with their education*".<sup>1086</sup> The Claimants have also stated that they attended an American church<sup>1087</sup>

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<sup>1083</sup> The Claimants have indicated that they obtained the Dominican nationality in 2010. According to Exhibit R-18, such nationality was approved by Presidential Decree No. 931-09 issued on December 30, 2009.

<sup>1084</sup> Reply Memorial, ¶¶ 40-45.

<sup>1085</sup> The Respondent indicated in its Statement of Defense that: "The Ballantines ... sent their two youngest children to school there." Statement of Defense, ¶ 41.

<sup>1086</sup> Supplemental Witness Statement of Michael Ballantine, ¶ 24; Second Witness Statement of Lisa Ballantine, ¶ 3.

<sup>1087</sup> Reply Memorial, ¶¶ 44-45



and that their home was not a Dominican home in which English was the language spoken at all times.<sup>1088</sup>

569. Whilst this may have been the case and it certainly could indicate a desire to keep connections with the United States and their sentiment of belonging, the Claimants did move to and lived in the Dominican Republic for a significant period of time, eight years up to the moment their claim was submitted. They started a business there (in the case of Ms. Ballantine she established a factory for her non-profit organization) which they conducted for that period of time and it would be difficult to consider that they did not integrate into the Dominican community during that time without making personal and professional relations of some type. Ms. Ballantine has indicated that she had personal connections in the Dominican Republic although limited<sup>1089</sup> and Mr. Ballantine has indicated personal and professional connections as well.<sup>1090</sup> The Tribunal also notes that while requesting the Tribunal to assess moral damages the Claimants not only contend that they were forced to abandon the “*efforts of ten years of hard work*” but also that “*they were forced to sell their home and leave their friends and colleagues in the Dominican Republic*”.<sup>1091</sup> (Emphasis added)

570. Mr. Ballantine has expressed that “*we developed a deep love and passion for the people and culture of this beautiful island*”<sup>1092</sup> and

I can't deny that I have sentiment for the Dominican Republic and there was good experiences and, you know, that there was positive things in the Dominican Republic. It wasn't like it was all conspiracy and bad and evil. There was good times and, you know, there's some very nice people. So, I can't deny that.<sup>1093</sup>

571. Ms. Ballantine has expressed as well that they “*love the Dominican Republic, it is [their] country, [she is] Dominican now and [they] invest[ed] everything here and [they] feel like a pain, like rejection*”.<sup>1094</sup> For the Tribunal these elements indicate personal attachment for the Dominican Republic. However, there seems to be some contradiction with other statements provided by the Claimants in this regard. Ms. Ballantine has indicated that her “*cultural connection to the*

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<sup>1088</sup> Rejoinder on Jurisdiction and Admissibility, ¶ 45.

<sup>1089</sup> “I had American Friends with whom I was a part of a Bible study group ... I had few Dominican friends”. Second Witness Statement of Lisa Ballantine, ¶ 7.

<sup>1090</sup> “Socially, we had very few Dominican friends, but chose to associate almost exclusively with American missionary friends and other American expats. My best friends were Americans who I met with several times a week. My Dominican relationships were with employees as they related to la Jamaca de Dios, as well as customers on a professional level. Supplemental Witness Statement of Michael Ballantine, ¶ 5.

<sup>1091</sup> Amended Statement of Claim, ¶ 322.

<sup>1092</sup> Jamaca de Dios Website, “History” Page, **Exhibit R-11**, p. 1.

<sup>1093</sup> Hearing Transcript, Day 2, 483 (English).

<sup>1094</sup> Transcript of “Nuria” Report (June 29, 2013), **Exhibit C-25**.

[Dominican Republic] *was limited*<sup>1095</sup> and Mr. Ballantine stated that they “*did very little to even try to assimilate with Dominican culture*”,<sup>1096</sup> “*I did not integrate with the culture. I was an investor*”,<sup>1097</sup> “[t]here’s some relationships, some people I still keep in contact with. But there’s nothing cultural that’s been enduring whatsoever.”<sup>1098</sup>

572. The Claimants have provided evidence from the years 2012 to 2014 in which they state: “[t]hey really have no idea how their perpetual actions, and threats has devastated us and our desire to continue in their country [...] I cannot wait to get out of this place”,<sup>1099</sup> “I haven’t really made friends here in the DR. It is a difficult culture to connect with and [I] am still an outsider [...] I am pretty lonely.”<sup>1100</sup>

573. The Tribunal considers that the Claimants had personal connections or attachment to both the United States and the Dominican Republic during the relevant period. We are aware that the extent of such connections is difficult to measure objectively, particularly to the extent there have been some contradictory statements. In terms of professional relations, the Claimants seem to have been more connected to the Dominican Republic by virtue of their investment, however, it appears to this Tribunal that, although the Claimants had personal and professional attachments to the Dominican Republic, the attachments to the U.S. seem to be of equal force.

### 3. The Center of the Person’s Economic, Social and Family Life

574. In their Notice of Arbitration as well as in their Amended Statement of Claim, the Claimants mention within the jurisdictional issue that the “*entirety of the capital [...] initially invested in Jamaca de Dios originated in the United States*”.<sup>1101</sup> They also contend that they have continued to maintain financial connections to the United States.<sup>1102</sup>

575. According to the facts and evidence presented before this Tribunal, the Claimants have financial connections to both the United States and the Dominican Republic. Regarding the U.S., they both maintained a checking account, Mr. Ballantine maintained an individual retirement account, Ms. Ballantine established a non-profit organization named Filter Pure, Inc and they established

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<sup>1095</sup> Second Witness Statement of Lisa Ballantine, ¶ 7.

<sup>1096</sup> First Witness Statement of Michael Ballantine, ¶ 89.

<sup>1097</sup> Hearing Transcript, Day 2, 480 (English).

<sup>1098</sup> Hearing Transcript, Day 2, 486 (English).

<sup>1099</sup> Email from Michael Ballantine (August 11, 2014), **Exhibit C-166**.

<sup>1100</sup> Email from Lisa Ballantine (November 29, 2013), **Exhibit C-165**. See also Email from Michael Ballantine (January 29, 2012), **Exhibits C-163**; Email from L. Ballantine (November 19, 2013), **Exhibit C-164**.

<sup>1101</sup> Notice of Arbitration, ¶ 21; Amended Statement of Claim, ¶ 155.

<sup>1102</sup> Response to the Request for Bifurcation, ¶ 34.

another non-profit organization named Jesus For All Nations, even though the purpose of this non-profit entity was to distribute innovative water filters throughout the Dominican Republic and Haiti.<sup>1103</sup> In the case of the Dominican Republic Mr. Ballantine maintained also accounts in Dominican banks, both had saving accounts and accounts related to Jamaca de Dios, and a factory was established in relation to Ms. Ballantine's non-profit organization.<sup>1104</sup> Regarding the origin of the capital initially invested, we do not consider such factor has a lot of weight since the capital was invested to create Jamaca de Dios.

576. Regarding where the center of the Claimants economic, social and family life was, this Tribunal is of the view that during the relevant time such center was in the Dominican Republic. According to the facts of the case, the Claimants moved to the Dominican Republic in 2006 and made a significant investment creating Jamaca de Dios, a luxury residential community; in order to do this, they sold two of their homes and commercial real estate<sup>1105</sup>. Therefore, the reason for moving to the Dominican Republic was to *establish Jamaca de Dios*<sup>1106</sup> and although they maintained connections to the United States, it seems to the Tribunal that from 2006 to the moment the claim was submitted, the Claimants had moved or relocated their economic center and their family center to the country where they resided permanently, independently of the fact that they often visited the United States, that their children continued their education in the U.S or that they kept social relations in the U.S. The fact is that the Claimants established what appeared to be their "main" business in the Dominican Republic<sup>1107</sup> and reorganized their way of living in the Dominican Republic for several years around the investment. In consequence, this Tribunal is of

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<sup>1103</sup> See Chase Account Confirmation for Account #1110017084988, **Exhibit C-81**; Ameritrade Account Statements, **Exhibit C-82**; Filter Pure Inc., Articles of Incorporation (February 26, 2008), **Exhibit C-83**; Jesus For All Nations, Tax Return (2010), **Exhibit C-84**; Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (October 2014), **Exhibit R-236**; Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (May 2013), **Exhibit R-237**; College Savings Account Records (undated), **Exhibit R-238**; Account Balance Summary, Jamaca de Dios (December 2010), **Exhibit R-239**; Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (June 2012), **Exhibit R-241**.

<sup>1104</sup> See Certification, Asociación La Vega Real de Ahorros y Préstamos (January 15, 2013), **Exhibit R-215**; Letter from Banco BHD to M. Ballantine (January 16, 2013), **Exhibit R-223**; Letter from Banco Popular Dominicano to Jamaca de Dios (January 14, 2013), **Exhibit R-230**; Letter from Esperanza Marte, Banco Popular Dominicano (January 14, 2013), **Exhibit R-288**; First Witness Statement of Lisa Ballantine, ¶ 5.

<sup>1105</sup> First Witness Statement of Lisa Ballantine, ¶¶ 2-3.

<sup>1106</sup> First Witness Statement of Michael Ballantine, ¶¶ 5, 6, 10-16. "It was a significant undertaking which took time and money". *Ibid*, ¶ 17.

<sup>1107</sup> Ms. Ballantine also established a factory for her Filter Pure non-profit. See First Witness Statement of Lisa Ballantine, ¶ 5. According to Mr. Ballantine, "we wanted to live in the complex to show that we had a 100% commitment to what we were doing". The Claimants also built a successful restaurant. See First Witness Statement of Michael Ballantine, ¶¶ 20, 23, 24, 26. "[O]ur investment in Jamaca de Dios required Lisa and I to reside in the Dominican Republic". Supplemental Witness Statement of Michael Ballantine, ¶ 7.

the view that the Dominican Republic was the center of their economic, family and social life, despite maintaining ties with the U.S.

577. Although Ms. Ballantine indicated that the original plan was to manage the investment from Chicago but that they realized the project would need more direct oversight,<sup>1108</sup> they moved to Jarabacoa because of the investment. She characterized Mr. Ballantine's work as "*largely in the DR*" while hers "*largely outside the DR.*"<sup>1109</sup> The Tribunal is aware that Ms. Ballantine's non-profit organization resulted in her traveling more often, however, she still resided permanently in the Dominican Republic, established a factory there and most of her days were spent in that country. She also stated that in the Dominican Republic, she worked and partnered with local NGOs and was responsible for raising money and distributing filters manufactured in the factory established therein and that she helped administer the Jamaca de Dios Foundation.<sup>1110</sup> All of these elements support our conclusion that the center of the Claimants' economic, social and family life was in the Dominican Republic, a connection stronger to the one maintained with respect to the U.S throughout the relevant times.

#### 4. Naturalization

578. The Claimants voluntarily acquired, through naturalization, the Dominican nationality on December 30, 2009.<sup>1111</sup> In addition, they made the relevant citizenship requests for two of their children, for whom they stated formally to the authorities: "[w]e want the Dominican citizenship to be granted to them as well since they comply with all the requirements according to the Law and we feel very identified with the sentiment and Dominican customs since we have had a close bond of coexistence and respect".<sup>1112</sup> The Tribunal notes that a similar statement was provided in relation to the Claimants' naturalization process.<sup>1113</sup>

579. In *Nottebohm*, the ICJ took the view that naturalization, as opposed to other factors which it considered merely illustrative, would always be a relevant factor. Hence, it considered that

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<sup>1108</sup> Second Witness Statement of Lisa Ballantine, ¶ 3.

<sup>1109</sup> Second Witness Statement of Lisa Ballantine, ¶ 4.

<sup>1110</sup> Second Witness Statement of Lisa Ballantine, ¶¶ 4-6.

<sup>1111</sup> Presidential Decree No. 931-09 (December 30, 2009), **Exhibit R-18**.

<sup>1112</sup> Josiah and Tobi Ballantine's Naturalization File, **Exhibit R-36**, p. 24 (Unofficial translation). The Tribunal takes note that during the hearing, Mr. Ballantine indicated that his wife chose to be a Dominican citizen "Reluctantly". Hearing Transcript, Day 2, 478 (English).

<sup>1113</sup> Letter from Griseldi Rafael Rodriguez to the President of the Dominican Republic (December 11, 2009), **Exhibit R-17** This exhibit contains a letter sent by the Claimants' lawyer in which naturalization is requested for both of them due to the fact that they comply with the requirements established in the Law and they "identify with the sentiment and Dominican customs as they have had a close bond of coexistence and respect with our country, therefore they would be pleased to legally confirm, their Dominican sentiment". Unofficial translation.

“[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being”.<sup>1114</sup> We agree with this last statement. Naturalization is an important event in a person’s life. It creates a particular bond to a country that certainly has legal consequences, and thus, should not be taken lightly. In this case, the ICJ asserted the “*profound significance*” and “*the serious character*” of such procedure and took into account within its examination that “*naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred*”.<sup>1115</sup> Furthermore, it considered that:

[i]n order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it.<sup>1116</sup> (Emphasis added)

580. This would, in fact, suggest that naturalization is also a key component to be analyzed within the dominant and effective nationality test. The Tribunal observes that in *Nottebohm*, naturalization was understood as involving “*breaking of a bond of allegiance and [the] establishment of a new bond of allegiance*”. This does not seem to be expected or foreseen by DR-CAFTA. If that were the case, the dominant and effective nationality test would not serve its purpose in the event that an individual possessed two nationalities, one acquired after the other one. This would be the case since a “breaking of allegiance” would actually imply the existence of only one nationality, the nationality with respect to which a new bond of allegiance is established. As mentioned above, dual nationality does not seem to be a matter of extinguishing one bond in favor of another but of assessing the qualities that characterize those bonds in terms of strength and effectiveness.

## 5. The Reason to be Naturalized as Dominicans

581. The Claimants have asserted that they applied to be naturalized in order to protect their investment and avoid discrimination.<sup>1117</sup> In his witness statement, Mr. Ballantine indicated the decision to naturalized as Dominicans was made for “*asset protection*”<sup>1118</sup>, to “*protect our investment and to minimize government obstruction, as well as any perceived biases in the market*”.<sup>1119</sup> In her

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<sup>1114</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 24, **Exhibit RLA-6**.

<sup>1115</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 26, **Exhibit RLA-6**.

<sup>1116</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 24, **Exhibit RLA-6**.

<sup>1117</sup> Reply Memorial, ¶ 13.

<sup>1118</sup> Supplemental Witness Statement of Michael Ballantine, ¶ 3.

<sup>1119</sup> First Witness Statement of Michael Ballantine, ¶ 88.

witness statement, Ms. Ballantine indicates her reason for becoming a Dominican Republic citizen was “*to protect our investment in case of our demise. I was concerned that our children could lose the entire investment if were we to die*”.<sup>1120</sup> During the hearing, Mr. Ballantine was asked the reason for taking the decision to become a national of the Dominican Republic, to which he responded:

Yes. Primarily, at that time I thought that I owned a very valuable piece of property in the mountains of the Dominican Republic. And I felt very insecure, in case of my demise or my wife’s, what would happen through an arbitrary court ruling or my children having to pick up the pieces, and I thought that it might help protect our estate. Secondly, I felt like it was important for a business decision in order for the commercial aspects. There were oftentimes people that wouldn’t buy from me, for example, because they didn’t think that I was committed and they were afraid to buy from a gringo and they would feel more comfortable. And so I lost sales. It was a very simple process. There was no renunciation of anything. I lost nothing as a United States citizen, and I just simply became a Dominican citizen. And from my understanding, I gained no other right other than the right to vote. And so that was-- it was only-- had to do with economics and it had to do with estate protection. I did not integrate with the culture. I was an investor. And we spent most of our time, as much as possible, away.<sup>1121</sup> (Emphasis added)

582. The Tribunal considers this criterion is directly related to the objective of investment protection. As already mentioned, we agree with the tribunal in *Nottebohm* in that “[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being”.<sup>1122</sup> Naturalization is an important event. A serious event with legal consequences that should not be taken slackly. It appears that the Claimants’ understanding on naturalization was different. This would seem evident from Mr. Ballantine’s statement above regarding what Dominican nationality entailed. Furthermore, the Claimants took this step for two of their children.<sup>1123</sup> However, that same step did not seem to have the same connotation for the Claimants either.<sup>1124</sup>

583. Naturalization bestows an individual with a set of rights and obligations and creates a particular bond between the individual and the State. In this Tribunal’s view, naturalization should not be equated to the purchase of a good or service. Regardless of this, the naturalization by the Claimants as Dominicans produced effects and altered their condition as only U.S. nationals during a period relevant for the application of DR-CAFTA Chapter 10. As mentioned above,

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<sup>1120</sup> Second Witness Statement of Lisa Ballantine, ¶ 15.

<sup>1121</sup> Hearing Transcript, Day 2, 479-480 (English).

<sup>1122</sup> *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (April 6, 1955), p. 24, **Exhibit RLA-6**.

<sup>1123</sup> Josiah and Tobi Ballantine's Naturalization File, **Exhibit R-36**.

<sup>1124</sup> At the hearing, Mr. Ballantine expressed the following in response to the question of whether his children were naturalized: “My two oldest were not. My two youngest were--were on their way out, and I said, ‘Hey, do you guys want to become Dominican too? I can get you a passport for a souvenir.’ That’s all it was. There was no commitment. It was just like, ‘Hey, you guys can have a passport too, because we’re Dominicans.’ That was the extent of the conversation, like, ‘Yeah, I’ll take one.’ That was it.” Hearing Transcript, Day 2, 480 (English).

Chapter 10 protects foreign “investments” and “investors”. It is not designed nor meant to be applied to citizens of the host State, at least not when their dominant and effective nationality is that of the host State. Therefore, this Tribunal finds relevant the fact that the main reason for the Claimants to acquire a second nationality was the *investment directly related to this proceeding*.

584. Whilst the Claimants have mentioned that discriminatory treatment was one of the reasons for becoming Dominican, the Claimants have expressed that their motives were for protection *of the investment*, as a business decision for commercial aspects, an economic decision. The sole reason for becoming Dominican and *domestic investors* was *the investment*. The Tribunal finds trouble reconciling the fact that the Claimants’ desire was to be viewed as Dominicans for purposes of bolstering their investment and yet, regarding the application of the protections designed for foreign investors, they contend such nationality is not as important.

## 6. Conduct of the Host State and Other Authorities

585. The Claimants have also argued that a relevant factor is how the United States and the Dominican Republic viewed them. Particularly, the Claimants consider the fact that U.S. diplomatic officials advocated on their behalf as evidence of their dominant and effective nationality.<sup>1125</sup> We do not consider this is the case. In the Tribunal’s opinion, the actions of diplomatic officials do not imply that an assessment was made as to which nationality is dominant and effective. This is particularly true when there is no evidence that authorities knew or could have known that the person involved had another nationality.

586. In this regard, we note that in its submission under Article 10.20.2, the United States actually indicated that: “*it does not take a position in this submission on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.*”<sup>1126</sup> It also indicated that “*where U.S. embassies or consulates provide facilitative assistance to U.S. nationals abroad in connection with disputes between those nationals and other countries, such officials typically do not make a legal determination with respect to a dual national’s dominant and effective nationality in order to provide such assistance.*”<sup>1127</sup> As to the Respondent, this Tribunal considers that the involvement of agencies in charge of foreign investment do not equate to a determination of dominant and effective nationality. In the Tribunal’s opinion the evidence does not indicate that U.S. Embassy

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<sup>1125</sup> Reply Memorial, ¶¶ 59-70.

<sup>1126</sup> Submission of the United States, ¶ 1.

<sup>1127</sup> Submission of the United States, p. 2, fn. 1.

officials or officials in the agency responsible for foreign investment in Dominican Republic were aware of the Claimants' dual nationality.

587. As mentioned above, the dual nationality test does not require a person to renounce their citizenship and it would seem that officials treated them as foreign investors when they presented themselves that way. Regarding the consequences prescribed in Dominican domestic law, which may result in a person losing such citizenship, we do not view such factor as relevant to determine the effectiveness and dominance of such a bond. The fact is that the bond exists.<sup>1128</sup>

## 7. How the Claimants Presented Themselves

588. The Ballantines presented as evidence the contracts from the lot sales in Phase 1 of Jamaca de Dios.<sup>1129</sup> They contend that a more compelling fact regarding those sales is that every lot sale was conducted in U.S. dollars. The Tribunal does not consider this fact to be as compelling as the Claimants do in terms of nationality. Particularly since a fair amount of the contracts indicate “*or its equivalent in RD*” after the price of sale is determined in U.S. dollars. The Tribunal could also locate a small amount of contracts in which quantities in Dominican Republic Pesos were established.<sup>1130</sup>

589. The Exhibit presented by the Claimants contains contracts certified by a public notary. From those contracts, the Tribunal could identify 77 specific contracts signed by Mr. Ballantine in representation of “Jamaca de Dios Jarabacoa, C. por A.” Those contracts were not signed by Mr. Ballantine in a personal capacity, but on behalf of the company (*i.e.* the investment) as president. The Tribunal observes that in those contracts, Mr. Ballantine identifies himself as national of both the United States and the Dominican Republic in five cases, as Dominican in 41 and as U.S. national in 31. Moreover, from those 31 contracts 19 were signed in the years 2006-2009 before the Claimant had gone through the process of naturalization, therefore, there was only one nationality that he could present: the American. In the rest of the contracts, he presented himself as U.S. national even though he had already acquired the Dominican nationality, *i.e.* in 12 contracts signed mostly in 2010 and 2011 and one in 2013.

590. On the other hand, the contracts in which Mr. Ballantine identified himself as Dominican, were signed between 2010 and 2015, *i.e.* Mr. Ballantine continued to present himself as Dominican

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<sup>1128</sup> Reply Memorial, ¶¶ 71-75.

<sup>1129</sup> Jamaca de Dios Lot Sales - Phase 1, **Exhibit C-162**.

<sup>1130</sup> Jamaca de Dios Lot Sales - Phase 1, **Exhibit C-162**.



even after the claim was submitted. The Respondent also presented evidence in this regard,<sup>1131</sup> in which the number of contracts signed by Mr. Ballantine as Dominican is also higher. We consider this evidence to be relevant in showing his Dominican nationality *prevailed* over the times he presented himself as U.S national in formal acts directly related to the investment.

591. Regarding Ms. Ballantine, the evidence presented does not involve her directly since the contracts were signed by Mr. Ballantine as president of Jamaca de Dios. Mr. Ballantine's actions seem to confirm his statements regarding the investment being the reason to apply for naturalization as Dominican and it would appear to have been a conscious decision of both Claimants as addressed below. Therefore, the Tribunal is not fully convinced that the fact that Ms. Ballantine did not sign contracts necessarily means that she did not apply for Dominican naturalization for the investment or that it was not a business decision for Jamaca de Dios which involved her.

592. Another way in which the Claimants have presented themselves in terms of nationality is through the use of the official document issued by each State to attest for the nationality of its citizens, that is, through the use of their passport. The Respondent presented the Claimants' migration records for the years 2010 to 2014.<sup>1132</sup> According to those records, the Claimants entered to the Dominican Republic mostly as nationals by way of their Dominican passport and exited the country with their American passport.

593. Although the Claimants have argued that the Dominican passport was not used when travelling internationally, but only when entering the Dominican Republic,<sup>1133</sup> we recall that nationality establishes a legal connection between a State and a person. The Tribunal takes note that Mr. Ballantine's view on the Dominican passport itself, expressed in the hearing, differs. At the hearing, Mr. Ballantine indicated:

The only travel benefit that we ever received was--which is the same right afforded to a resident--is that I pay a \$10 entrance tax or be penalized for staying in the country too long. But that same right is given to residents as well... Yes. We saved \$10. You're correct.<sup>1134</sup>

594. Dominican records show that only on two and three occasions, did Mr. and Ms. Ballantine, respectively, enter the Dominican Republic as Americans. In 25 and 30 occasions they entered with their Dominican passports, respectively. On the other hand, they exited the country more often as Americans on 21 and 30 occasions. The numbers seem closely even, which suggests the

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<sup>1131</sup> Table of Nationalities Used in Jamaca de Dios Sales Contracts, **Exhibit R-290**. This Table appears to have been elaborated based on the contracts presented in R-209. Although the table includes cases in which Mr. Ballantine presented himself only as U.S national, as well as both Dominican and American, the numbers are significantly lower than the ones presented according to Exhibit C-162.

<sup>1132</sup> Migratory Records for Michael and Lisa Ballantine (August 25, 2016), **Exhibit R-19**.

<sup>1133</sup> Response to the Request for Bifurcation, ¶¶ 38-40.

<sup>1134</sup> Hearing Transcript, Day 2, 481 (English).

Claimants' intention to be recognized as Dominicans when entering the country as well as Americans when leaving the country towards the United States. This line of thinking would not change the fact that they represented themselves more often as Dominicans before the Dominican authorities. We do not consider the fact that such representation was being made so to speak "domestically" to be less valid.<sup>1135</sup>

595. The Tribunal also considers relevant the fact that the Claimants presented themselves as nationals, *e.g.* when voting.<sup>1136</sup> The Claimants have argued that this fact does not support that their Dominican nationality was dominant since they also voted in the U.S. elections in 2014.<sup>1137</sup> The Tribunal agrees that the evidence presented on this factor does not reflect a preference for Dominican nationality, however, it does not consider that it reflects preference for the American nationality either.

596. The Claimants have also argued that "*after the Ballantines became naturalized Dominican citizens, they applied [to] have Jamaca de Dios registered as a foreign investment under the Dominican Foreign Investment Law 16-95.*"<sup>1138</sup> (Emphasis in original) However, such procedure was not completed.<sup>1139</sup> The Claimants contend that they were "*awaiting approval of their Phase 2 permitting request*" but that their application confirms their intention "*to return the anticipated profits [...] to the United States, their dominant nationality*". We do not consider these facts to evidence that the Claimants' request relates to their perception of the United States as their dominant and effective nationality. The facts of the case indicate that although they submitted such request, the procedure was never completed, which could also prove a point regarding Dominican nationality contrary to the Claimants' assertions.

#### D. CONCLUSION

597. Having analyzed the evidence and arguments put forward by the Parties, while this Tribunal cannot deny the fact that during the relevant period, the Claimants maintained connections to the United States and this also seems natural from the fact that they were born and lived in that country for the majority of their lives, in this Tribunal's opinion, during the relevant period the Dominican nationality was effective and took precedence over the American nationality. Although the

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<sup>1135</sup> According to the exhibits submitted, Mr. Ballantine also presented himself as Dominican before a local court as Claimant in a domestic procedure. *See* Hearing Minutes, La Vega Tribunal de Tierras (September 12, 2013), **Exhibit R-26**; Hearing Minutes, La Vega Tribunal de Tierras (November 21, 2013), **Exhibit R-27**.

<sup>1136</sup> Jarabacoa Voting Records, **Exhibit R-20**.

<sup>1137</sup> Response to the Request for Bifurcation, ¶ 43, Rejoinder on Jurisdiction and Admissibility, ¶ 55; Supplemental Witness Statement of Michael Ballantine, ¶ 26.

<sup>1138</sup> Response to the Request for Bifurcation, ¶ 45.

<sup>1139</sup> According to Exhibit R-224, the procedure was suspended.

Claimants maintained residential connections to the United States, their permanent residence was in the Dominican Republic, overall, most of their days from 2010 to 2014 were spent in the Dominican Republic, they changed their status to permanent residents and later to Dominican citizens.

598. While their personal and professional relations to the Dominican Republic may have been limited, it is difficult to deny that during that period of time their investment kept them economically centered in the Dominican Republic. In the case of Ms. Ballantine, although she managed her non-profit organization and travelled more, she still was resident and established herself in the Dominican Republic. Both of the Claimants continued with their life in the Dominican Republic. Moreover, both of them voluntarily decided to change their status of permanent residents to a status of nationals because of the investment, whether such decision may have entailed different consequences in their mind, they decided to change their status to be viewed as Dominicans and treated as Dominicans. They presented themselves as Dominicans. That nationality was key to their business.<sup>1140</sup>
599. In sum, the Claimants' motivation for taking on the Dominican nationality was said to be economic and commercial in nature, for their business and the substantial investment they had made. During that relevant period of time, they lived, ran a business and accepted to be viewed as Dominicans. Nationality was not forced upon them, it was requested<sup>1141</sup> and accepted by them. It is not the intention of this Tribunal to assert that the Claimants ceased to be Americans or that they did not have connections to that country. As already indicated, acquired dual-nationality is not about renouncing one nationality or ceasing to have connections with one's country of origin.
600. Thus, the Tribunal considers that their Dominican nationality took precedence during the relevant times, i.e., at the time the alleged measures were taken and at the time of the submissions of the claim. Therefore, the Claimants do not qualify as investors of a Contracting Party in accordance to the definition set forth in Article 10.28 of DR-CAFTA.

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<sup>1140</sup> Jamaca de Dios Website, "History" Page, **Exhibit R-11**.

<sup>1141</sup> Letter from the Dominican Ministry of Interior re Lisa Ballantine (October 7, 2009), **Exhibit R-13**; Letter from the Dominican Ministry of Interior re Michael Ballantine (October 7, 2009), **Exhibit R-14**. See also Record of Swearing-In of Michael Joseph Ballantine (November 18, 2010), **Exhibit R-33**; Record of Swearing-In of Lisa Ballantine (November 18, 2010), **Exhibit R-34**; Michael Joseph Ballantine's Naturalization Files, **Exhibit R-38**; Lisa Ballantine's Naturalization Files, **Exhibit R-39**.

## **XI. COSTS**

601. The Parties' respective positions on costs are summarized in Section IX. Each Party requested the Tribunal to order the other Party to pay all the costs and fees related to this dispute.

602. Pursuant to Article 40 of the UNCITRAL Rules, the Tribunal will first fix the costs of the arbitration and later proceed to apportion those costs between the Parties, in accordance with Article 42 of the UNCITRAL Rules.

### **A. FIXING THE COSTS OF THE ARBITRATION**

603. Article 40(2)(a) and (b) of the UNCITRAL Rules states that the fees and expenses of the arbitral tribunal must be stated separately as to each arbitrator and fixed by the tribunal itself in accordance with Article 41.

604. The fees of Ms. Marney Cheek, co-arbitrator amount to USD 110,962.50 and her expenses amount to USD 386.37.

605. The fees of Prof. Raúl Emilio Vinuesa, co-arbitrator, amount to USD 196,687.50 and his expenses amount to USD 9,779.68.

606. The fees of Prof. Ricardo Ramirez Hernandez, presiding arbitrator, amount to USD 244,070.60 (plus VAT USD 38,541.30) and his expenses amount to USD 5,629.48.

607. The costs of other tribunal expenses, including the costs of ICSID facilities for the Hearing, court reporting in both English and Spanish, simultaneous interpretation, audio and video technicians, live broadcasting of the Hearing, catering, translation, telecommunication, bank charges, printing and courier charges, and others total USD 169,796.13.

608. PCA fees amount to USD 108,980.36 and its expenses amount to USD 10,073.45.

609. Each Party paid advances on costs to the PCA in the amount of USD 450,000, i.e. a total advance of USD 900,000. The unexpended balance of the deposit amounts to USD 5,092.59.

610. In accordance with Article 10.19(2) DR-CAFTA, the Secretary-General of ICSID acted as appointing authority and the fees incurred in this regard amount to USD 10,000. This fee was paid by the Claimants.

611. Based on the sum of the above figures the total costs of the arbitration amount to **USD 904,907.41**.

612. As for the Parties' respective costs of legal representation and expert assistance, the Claimants' affirm that their costs amount to USD 1,424,852.70 in legal fees and expenses for its arbitration-related counsel; USD 491,898.57 in expert fees and expenses; and USD 131,682.21 in additional expenses.

613. The Respondent, in turn, affirms that its costs related to this arbitration amount to USD 2,611,371.56 in legal fees and expenses for its counsel, Arnold & Porter; USD 562,529.26 in expert fees; and USD 7,670.00 and DOP 2,874,522.29 in additional expenses.
614. Considering the complexity of this proceeding, the novel issues of fact and law that have arisen in its context, and other relevant circumstances, the Tribunal determines that the Parties' costs are reasonable in accordance with Article 40(2)(e) the UNCITRAL Rules.

**B. APPORTIONING THE COSTS OF THE ARBITRATION**

615. The Claimants argue that the Respondent should pay all the costs and fees of the Arbitration based on the way the Respondent's officials acted.<sup>1142</sup> In particular, the Claimants argue that the Respondent's officials "*took deliberate actions to harm the Ballantines' investment through a barrage of discriminatory, arbitration, and expropriatory measures.*"<sup>1143</sup> In addition, the Claimants contend that the Respondent's Admissibility Submission raised unnecessary costs and that the Claimants should not bear the costs of defending against it.<sup>1144</sup>
616. On the other hand, the Respondent argues that the Tribunal must grant the Respondent all of the costs of the proceeding, as well as legal fees and expenses, as the Claimants' claims lack jurisdiction and/or merits.<sup>1145</sup> The Respondent explains that "[o]ther relevant factors also militate in favor of an award of costs and legal fees to the Dominican Republic, including: the fact that the Ballantines do not qualify as "claimants"; the fact that their claims are substantively meritless; and the Ballantines' litigation style, which has caused unnecessary expenditures for the Dominican Republic (as for instance due to the Ballantines' constantly changing argumentation; their reformulation of the facts in each round of pleadings; and their willful omissions during document production.)."<sup>1146</sup>
617. As already noted by the Tribunal, this dispute was brought by the Claimants in accordance with DR-CAFTA and the UNCITRAL Rules.
618. Pursuant to DR-CAFTA Article 10.26 ("Awards"), a tribunal may award costs and attorney's fees in accordance with Section B and the applicable arbitration rules.

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<sup>1142</sup> Reply Memorial, ¶¶ 560-564.

<sup>1143</sup> Reply Memorial, ¶ 561.

<sup>1144</sup> Response to the Objection to Admissibility, ¶¶ 110-112.

<sup>1145</sup> Statement of Defense, ¶ 346. *See also* Objection to Admissibility, section IV, ¶ 4.

<sup>1146</sup> Rejoinder on Jurisdiction and Merits, ¶ 371.

619. DR-CAFTA Article 10.20.6 (“Conduct of the Arbitration”) provides:

When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

620. Article 42(1) of the UNCITRAL Rules provides:

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

621. The Tribunal notes that these provisions do share a common feature: they grant the Tribunal with discretion to allocate costs and fees between the Parties.

622. In light of the above cited provisions, such discretion is qualified, first, by the determination of whether an award on costs is warranted, the claimant’s claim is frivolous, and secondly, by the consideration of the particular circumstances of the dispute.<sup>1147</sup> In relation to the latter, other tribunals have taken into account: the complexity<sup>1148</sup> and novelty<sup>1149</sup> of the issues involved, the manner in which the Parties have conducted throughout the arbitration,<sup>1150</sup> including any misconduct,<sup>1151</sup> and whether the Parties presented solid or meritorious arguments.<sup>1152</sup>

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<sup>1147</sup> The Tribunal recalls that paragraph 3.1 of the Terms of Appointment states that “[p]ursuant to Articles 10.16(3)(c) and 10.16(5) of the CAFTA-DR, this arbitration shall be conducted in t to the extent modified by the CAFTA-DR.”

<sup>1148</sup> *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, (October, 17 2013), ¶ 228; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, (June 16, 2013), ¶ 236; *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, (April 30, 2015), ¶ 238.

<sup>1149</sup> *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, (April 30, 2014), ¶ 151.

<sup>1150</sup> *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, (February 10, 2012), ¶ 192; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction, (November 27, 2013), ¶ 276; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, (April 16, 2014), ¶ 259; *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, (October 1, 2014), ¶ 639; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Award, (February 20, 2015), ¶ 176.

<sup>1151</sup> *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, (October 25, 2012), ¶¶ 291-292; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, (May 5, 2015), ¶ 406.

<sup>1152</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, (August 22, 2012), ¶ 284; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, (June 11, 2012), ¶ 1345; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, (June 21, 2011), ¶ 385; *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyongkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, (April 17, 2015), ¶¶ 200-201.

623. The majority of the Tribunal is of the view that these criteria are objective and relevant to inform its decision on costs together with its assessment on whether the claim was “frivolous”, as established by DR-CAFTA, to determine whether a costs award in favor of the prevailing party is “warranted”. Moreover, despite providing for a general “loser pays” rule, the UNCITRAL Rules empower tribunals to apportion costs by simply determining that apportionment is “reasonable”. In this case the rules under DR-CAFTA and the UNCITRAL Rules must be read together. If the losing party’s claim was not frivolous, the Tribunal has discretion to decide whether there are circumstances in the present dispute that justify a reasonable allocation. The Tribunal also notes that the approaches followed by other tribunals in exercising their power to allocate costs vary from one dispute to another.
624. This is the case in the context of arbitrations under the DR-CAFTA. For example, in *RDV v. Guatemala*, the tribunal distinguished between jurisdictional and merits phases and ordered the respondent to bear the costs of the two jurisdictional phases that were rejected and each party to bear 50% of the costs of the merits phase.<sup>1153</sup> In *Corona Materials v. Dominican Republic*, the tribunal ordered that each party bear 50% of the arbitration costs and its own legal fees and expenses. In that case, the tribunal determined that “neither of the Parties has presented its cases in a way justifying the shifting of arbitral costs against it.”<sup>1154</sup> In *Pac Rim v. El Salvador*, the tribunal ordered the claimant to pay a proportion of the respondent’s legal costs and each party to bear its own share of the arbitration costs.<sup>1155</sup> In *Aven and others v. Costa Rica*, the tribunal ordered the claimants to bear all of the arbitrators’ fees and expenses, the ICSID administrative expenses and the direct expenses of the arbitration, and each party to bear its own legal costs and expenses.<sup>1156</sup> In all of these cases, the tribunals took into account the circumstances at issue rather than applying directly the principle of the “costs follow the event”.
625. In its jurisdictional objection, the Respondent argued that (i) the Ballantines did not qualify as “Claimants” as defined under DR-CAFTA Article 10.28 and (ii) their claims do not involve a breach of an obligation under Articles 10.1 to 10.14.
626. The Tribunal has already decided that the Claimants do not qualify as investors of a Contracting Party in accordance to the definition set forth in Article 10.28 of DR-CAFTA, therefore the

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<sup>1153</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, (June 29, 2012), ¶¶ 282-283. The Tribunal notes that this case was brought under the ICSID Arbitration rules.

<sup>1154</sup> *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, (May 31, 2016), ¶¶ 278-279. The Tribunal notes that this case was brought under the ICSID Arbitration rules.

<sup>1155</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, (October 14, 2016), ¶¶ 11.17-11.09, **Exhibit RLA-22**. The Tribunal notes that this case was brought under the ICSID Arbitration rules.

<sup>1156</sup> *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, (September 18, 2018), ¶¶ 765-767.

Respondent has prevailed regarding its preliminary objection. Consequently, the Tribunal lacks jurisdiction *ratione personae* to assess the merits of the dispute.

627. The question that follows for the Tribunal, is whether it is warranted that the Claimant should pay the Respondent all the costs and fees resulted from this dispute or whether costs and fees should be allocated in different portions.
628. As a starting point, the Tribunal notes that DR-CAFTA Article 10.20.6 (“Conduct of the Arbitration”) demands that the Tribunal determine, in this case, whether the Claimant’s claim was “frivolous”.
629. In the present dispute, the nationality issue before the Tribunal was different from others where investment tribunals often face a determination of whether the investor acquired nationality as a means of gaining treaty protection.<sup>1157</sup> Most important, the Tribunal noted that this is a case of first impression. In the absence of specific provisions under the DR-CAFTA setting a dominant and effective nationality standard, the Tribunal had to determine the meaning of “dominant” and “effective” in light of the unique factual circumstances of this case, the context provided for in the DR-CAFTA, its object and purpose, and the applicable rules of international law. In other words, the present dispute involved a complex and novel issue.
630. With regard to the conduct in this arbitration, the Tribunal considers that both Parties have conducted themselves in good faith and presented their arguments in support of their claims or defenses in a professional manner. In the Tribunal’s view neither Party caused an undue delay to this proceeding or otherwise had a procedural misconduct.
631. In addition, the majority of the Tribunal decided to hear the facts concerning the jurisdictional objection together with the facts concerning the merits. Both Parties submitted extensive arguments on the application of the dominant and effective standard as well as on the merits.
632. Having considered the facts of the dispute and the allegations, the majority of the Tribunal does not find elements to consider that such claim was “frivolous”. In *Commerce Group v. El Salvador*, the tribunal, having ruled in favor of the respondent, considered that to conclude that the claims were “frivolous” “would be to go too far”. The tribunal saw “no indication that [c]laimants were not serious about the claims they asserted in [the] proceedings, nor that the Claimants pursued

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<sup>1157</sup> See, e.g. *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, (January 9, 2015), ¶ 191; *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, PCA Case No. 2012-02, Award on Jurisdiction and Admissibility, (December 17, 2015), ¶¶ 554, 584; *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, (February 21, 2014), ¶ 70.



[the] *matter in bad faith*.<sup>1158</sup> In a similar situation, the tribunal in *Corona Materials v. Dominican Republic* that decided in favor of the respondent in matters of jurisdiction, stated that “*the facts surrounding the dispute and the allegations made [demonstrated] that the Claimant – even if it was wrong in the construction and application of the DR-CAFTA to said facts – had a bona fide claim and did not act with such wanton disregard of the facts and the law as to permit [the] tribunal to consider that its claim was ‘frivolous’*”<sup>1159</sup>.

633. In the present case, in the view of the majority of the Tribunal, the Claimants brought a credible case and presented their arguments on jurisdiction in good faith and fairly and they acted professionally during the proceeding<sup>1160</sup>. Likewise, the Respondent and its counsel also presented their jurisdictional objection in good faith and acted professionally. While the conduct of both Parties is relevant under the UNCITRAL chapeau of relevant circumstances, the inquiry of whether a claim is frivolous under DR-CAFTA must be focused on the losing party. In sum, the majority of the Tribunal considers that the good faith presumption was maintained in the presentation of the claim and the jurisdictional objection,<sup>1161</sup> and that the Parties conducted themselves in good faith throughout the proceedings.<sup>1162</sup>
634. The Tribunal also notes the discretion bestowed by the applicable arbitration rules to allocate the costs. In principle, such rules provide that the costs shall be borne by the unsuccessful party, but the Tribunal has authority to apportion such costs in a different manner if it finds that doing so would be reasonable, taking into account the circumstances of the case.
635. Notwithstanding that the Respondent prevailed in the jurisdictional objection and the Tribunal did not have to address the merits, the Claimant presented a *bona fide* claim. Having considered the particular circumstances of this case and in light of the fact that the claim brought was not “frivolous”, the majority Tribunal finds that it would be reasonable for each party to bear half of

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<sup>1158</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, (March 14, 2011), ¶ 137.

<sup>1159</sup> *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections, (May 31, 2016), ¶ 277.

<sup>1160</sup> Even if the Tribunal lacks jurisdiction to decide the merits of the case with final and binding effects, the Tribunal has nevertheless heard the Parties’ full arguments on the merits; and in the view of the majority of the Tribunal, it cannot avoid having formed a *prima facie* opinion of the case based on the facts and legal arguments alleged by both Parties. In fact, in order to determine whether a claim is frivolous or not, as required by DR-CAFTA, a tribunal must necessarily have an opinion, or otherwise it would simply be a meaningless standard whenever there is no jurisdiction.

<sup>1161</sup> See *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Provisional Award (December 1, 2008), ¶ 139, in the context of the burden of proof.

<sup>1162</sup> See *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, (September 17, 2009), ¶ 153; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, Part II, Chapter I, ¶ 54, **Exhibit CLA-11**.

the arbitration costs and its own legal fees and expenses incurred in this proceeding. Moreover, the Tribunal does not find any other element which would warrant an award on costs in favour of the Respondent.

636. While each Party has advanced USD 450,000 to the PCA to fund the costs of the proceedings, only the Claimants have paid the costs of the appointing authority (ICSID) in the amount of USD 10,000. Hence, the Respondent owes the Claimants the amount of USD 5,000. As stated above, the unexpended balance in the case deposit amounts to USD 5,092.59. In order to account for an equal distribution of costs, the PCA shall therefore reimburse to the Parties the unexpended balance of the deposit as follows: the amount of USD 5,046.29 to the Claimants, and the amount of USD 46.29 to the Respondent.<sup>1163</sup>

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<sup>1163</sup> The PCA will proceed to return these sums to the Parties once the 30 day period under Articles 37 to 39 of the UNCITRAL Rules has elapsed.

**XII. THE TRIBUNAL'S DECISION**

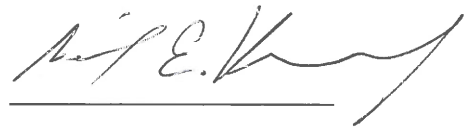
637. For the reasons stated, the Tribunal, by a majority vote, decides to:

- (a) DECLARE that it lacks jurisdiction over any of the Claimants' claims; and
- (b) ORDER each Party to bear its own legal costs, and that the common costs of the arbitration shall be borne in equal halves by the Parties.

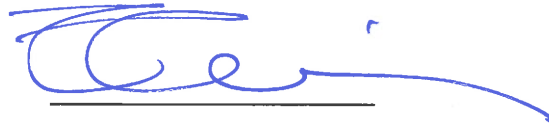
Done at Washington, D.C., United States of America, on 3 September, 2019.



Ms. Marney L. Cheek  
(subject to a dissenting opinion on jurisdiction)



Prof. Raúl Emilio Vinuesa  
(subject to a dissenting opinion on costs)



Prof. Ricardo Ramírez Hernández  
(Presiding Arbitrator)

PCA Case No. 2016-17

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC-  
CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT,  
SIGNED ON AUGUST 5, 2004 (the “DR-CAFTA”)**

**-and-**

**THE UNCITRAL ARBITRATION RULES (AS ADOPTED IN 2013)  
(the “UNCITRAL Rules”)**

**-between-**

**MICHAEL BALLANTINE AND LISA BALLANTINE**

**(the “Claimants”)**

**-and-**

**THE DOMINICAN REPUBLIC**

**(the “Respondent”, and together with the Claimants, the “Parties”)**

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**PARTIAL DISSENT OF MS. CHEEK ON JURISDICTION**

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*Tribunal:*

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)  
Ms. Marney L. Cheek  
Prof. Raúl Emilio Vinuesa

*Secretary to the Tribunal:*

Mr. Julian Bordaçahar

*Registry:*

**Permanent Court of Arbitration**

**3 September 2019**

## I. INTRODUCTION

1. While agreeing with many of the factual findings of the Majority, I respectfully register my dissent with regard to the test articulated for assessing the dominant and effective nationality of the Claimants and the ultimate conclusion of the Majority that the Tribunal has no jurisdiction to consider the merits of the Ballantines' claims based on a finding that their dominant and effective nationality on the relevant dates is Dominican.<sup>1</sup> I join the Award as to costs.
2. I am in agreement with my colleagues that, as a threshold matter, DR-CAFTA instructs that dual citizens such as the Ballantines may only assert a claim against the Dominican Republic if their dominant and effective nationality is, in this case, that of the United States at the time of the alleged breach and at the time of submission of the claim.<sup>2</sup> I also concur with many of the factual findings set forth in the Award. However, I respectfully dissent from the Majority's articulation of the legal test for dominant and effective nationality and the Majority's conclusion that Claimants' dominant and effective nationality on the critical dates is Dominican.
3. As explained below, through the inclusion of the phrase "dominant and effective nationality" in Article 10.28, the parties to the DR-CAFTA incorporated the customary international law standard for the treatment of dual nationality that this Tribunal is bound to apply. While my colleagues acknowledge the customary international law standard for assessing dominant and effective nationality, they ultimately depart from it. The Majority's analysis gives great weight to the Ballantines' investment-based contacts with the Dominican Republic during a narrow window of time.<sup>3</sup> While dominant and effective nationality must be assessed on certain dates, namely, the date of the alleged breach and the date of submission of the claim, it is the entire life of the individual that is relevant to the analysis. In other words, dominant and effective nationality is a distinct legal test separate and apart from the making of, maintenance of, or injury to a claimant's investment. When the customary international law standard is properly applied to the Ballantines, the conclusion reached is that the Ballantines' dominant and effective nationality on the critical dates is that of the United States.

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<sup>1</sup> Terms defined in the Award have the same meaning in this dissenting opinion.

<sup>2</sup> Award, para. 527.

<sup>3</sup> See, e.g., Award, para 583 ("[T]his Tribunal finds relevant the fact that the main reason for the Claimants to acquire a second nationality was the *investment directly related to this proceeding*." (emphasis in original)).

## II. ASSESSING DOMINANT AND EFFECTIVE NATIONALITY

4. Article 10.28 of the DR-CAFTA states that “a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.”<sup>4</sup> Through the use of the phrase “dominant and effective nationality,” the DR-CAFTA parties adopted the customary international law standard for determining nationality of dual citizens. I disagree with my colleagues, as set out in paragraph 530 of the Award, that the Tribunal should only “take guidance from customary international law, taking into account Article 10.28 particular context, within DR-CAFTA general object and purpose.”<sup>5</sup> Rather than “giving effect to the specific context provided for in this instrument as well as its object and purpose,”<sup>6</sup> the customary international law standard referenced in DR-CAFTA should be applied, without altering that test in an investment treaty-specific context. I disagree with the Majority that it is “appropriate to give specific meaning to the terms used in DR-CAFTA rather than directly incorporating any other standard[.]”<sup>7</sup>
5. Article 10.22 of the DR-CAFTA states that the governing law for this dispute is “this Agreement and applicable rules of international law.”<sup>8</sup> Where the DR-CAFTA parties have incorporated a rule of customary international law into the treaty, as they have done with regard to the dominant and effective nationality test, the Tribunal should simply apply it.
6. The standard in DR-CAFTA is the customary international law standard to determine dominant and effective nationality, articulated by the International Court of Justice (“ICJ”) in the *Nottebohm Case*<sup>9</sup> and reflected in the *Mergé Case* of the Italian-United States Conciliation

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<sup>4</sup> DR-CAFTA, Article 10.28 (R-10).

<sup>5</sup> Award, para. 530.

<sup>6</sup> Award, para. 530

<sup>7</sup> Award, para. 533.

<sup>8</sup> DR-CAFTA, Article 10.22(1) (R-10).

<sup>9</sup> *Nottebohm Case (Lichtenstein v. Guatemala) Second Phase*, ICJ, Judgment, (April 6, 1995), p. 23 (RLA-6) [hereinafter *Nottebohm Case*].

Commission<sup>10</sup> and decisions of the Iran-U.S. Claims Tribunal, notably *Case No. A/18* and *Malek v. Iran*.<sup>11</sup>

7. According to the ICJ in *Nottebohm*, “nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”<sup>12</sup> While the ICJ in *Nottebohm* was not concerned with dual nationality (the question in that case was one of diplomatic protection), the ICJ referenced the customary international law standard in cases of multiple nationalities, observing that:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next[.]<sup>13</sup>

8. To determine a natural person’s dominant and effective nationality is thus a fact-specific inquiry. As the Majority observes at paragraph 548, quoting *Nottebohm*, “the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”<sup>14</sup>
9. The *Mergé Case* and *Case No. A/18* reiterate this customary international law test. The *Mergé Case* tribunal observed that *Nottebohm* “is not a case of dual nationality; but it is interesting for our purposes to note what is set forth in the reasoning of the decision in regard to the problem of

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<sup>10</sup> *United States v. Italy*, It.–U.S. Conciliation Commission, Decision, (June 10, 1955) (RLA-7) [hereinafter *Mergé Case*].

<sup>11</sup> *Case No. A/18*, IUSCT Case. No. A/18, Decision No. DEC 32-A18-FT, (April 6, 1984) (RLA-8) [hereinafter *Case No. A/18*]; *Reza Said Malek v. Iran*, IUSCT, Interlocutory Award, (June 23, 1988) (CLA-51) [hereinafter *Malek*].

<sup>12</sup> *Nottebohm Case*, p. 23 (RLA-6).

<sup>13</sup> *Nottebohm Case*, p. 22 (RLA-6). See also *Mergé Case*, p. 244 (citing *Nottebohm Case*, p. 22) (RLA-7).

<sup>14</sup> Award para. 548 (citing *Nottebohm Case*, p. 22 (RLA-6)). The Iran-U.S. Claims Tribunal also made reference to these factors as relevant, although it stated that it would consider “all relevant factors”. See *Case No. A/18*, p. 12 (RLA-8).



dual nationality[.]” and went on to quote the *Nottebohm* passage above.<sup>15</sup> The tribunal in the *Mergé Case* then applied the test articulated in *Nottebohm*:

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.<sup>16</sup>

10. Similarly, the Iran-U.S. Claims Tribunal in *Case No. A/18* observed that the *Nottebohm Case* “demonstrated the acceptance and approval by the International Court of Justice of the search for the real and effective nationality based on the facts of a case, instead of an approach relying on more formalistic criteria.”<sup>17</sup> The Iran-U.S. Claims Tribunal went on to conclude that it had jurisdiction over cases of dual citizens against Iran where the dominant and effective nationality of the claimant was that of the United States. It then adopted the test in *Nottebohm*: “In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.”<sup>18</sup>
11. While dominant and effective nationality must be assessed on the date the claim arose and the date the claim was submitted for purposes of jurisdiction, the relevant period of time for determining dominant and effective nationality on those dates is an individual’s contacts over a lifetime. As the Iran-United States Claims Tribunal explained in *Malek*, “[o]bviously, to establish what is the dominant and effective nationality at the date the claim arose, it is necessary to scrutinize the events in the Claimant’s life preceding this date. Indeed, the entire life of the Claimant, from birth, and all the factors which during this span of time, evidence the reality and the sincerity of the choice of national allegiance he claims to have made, are relevant.”<sup>19</sup>
12. *Nottebohm* and its progeny’s list of considerations is not exhaustive, but it nevertheless establishes an objective factual inquiry. I disagree with my colleagues that application of the

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<sup>15</sup> *Mergé Case*, p. 244 (RLA-7).

<sup>16</sup> *Mergé Case*, p. 247 (RLA-7).

<sup>17</sup> *Case No. A/18*, p. 10 (RLA-8).

<sup>18</sup> *Case No. A/18*, p. 12 (RLA-8).

<sup>19</sup> *Malek*, p. 51 (CLA-51).

dominant and effective nationality test set forth in DR-CAFTA Article 10.28 should be applied to give greater weight to investment-related connections with the Dominican Republic because DR-CAFTA is an investment treaty. Specifically, I disagree with the Majority that “the inclusion of this phrase [*i.e.*, dominant and effective nationality] in an investment chapter within the broader framework of a Free Trade Agreement imbues that phrase with a specific meaning” and therefore “it [is] appropriate to give specific meaning to the terms used in DR-CAFTA rather than directly incorporating any other standard. . . . [.]”<sup>20</sup> The standard articulated in DR-CAFTA is not an investment treaty-specific test for dominant and effective nationality. Rather, it is the well-established customary international law standard. My opinion in this regard is consistent with the recent decision in *Aven v. Costa Rica*, where the tribunal applied the *Nottebohm* test in examining the question of dual nationality under DR-CAFTA Article 10.28.<sup>21</sup>

13. While the Majority and I agree that the Claimants’ entire lifetime is relevant to the dominant and effective nationality inquiry, we diverge where the Majority also focuses on what it deems the specific context of DR-CAFTA for the dominant and effective nationality test.<sup>22</sup> The Majority “considers that the *investment* itself, the status of *investor* as well as other circumstances surrounding those elements may be relevant factors for assessing nationality and its dominance and effectiveness within Article 10.28 of DR-CAFTA.”<sup>23</sup> This appears to go beyond an examination of the Claimants’ economic ties to both countries over their lifetimes. The Majority concludes that “a claimant’s entire life is relevant but not dispositive”<sup>24</sup> and examines whether the Claimants’ Dominican nationality “was strong enough to take precedence over their U.S. nationality and it was producing effects or was operative *during the relevant time* in order to determine whether they were investors under DR-CAFTA.”<sup>25</sup> The result of this approach, which the Majority describes elsewhere as “temporal context in which the terms of Article 10.28

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<sup>20</sup> Award, para. 533.

<sup>21</sup> See Award, para. 543, n. 1056. *David Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award (18 September 2018), para. 205 (“Through inclusion of the expression ‘dominant and effective nationality’ in Article 10.28 definition of ‘Investor of a Party,’ the DR-CAFTA Parties intended to incorporate by reference the applicable standards of customary international law for the treatment of multiple nationalities in diplomatic protection cases, as reflected in the *Nottebohm* Case (*Liechtenstein v. Guatemala*).”).

<sup>22</sup> See Award, Section X.B.2(e).

<sup>23</sup> Award, para. 554.

<sup>24</sup> Award, para. 555.

<sup>25</sup> Award, para. 557 (emphasis added).

shall be interpreted,”<sup>26</sup> is to give greater weight to the Claimants’ investment-related contacts as of the date the claim arose and the date the claim was submitted,<sup>27</sup> rather than engaging in a truly holistic inquiry of the Claimants’ entire lifetimes on each of those dates.

14. The proper inquiry should examine the Claimants’ ties to the United States and the Dominican Republic over the course of their lifetimes to determine whether, at the time of the alleged breach (*i.e.*, 12 September 2011)<sup>28</sup> and at the time of the submission of the claim to arbitration (*i.e.*, 11 September 2014), the dominant and effective nationality of each Claimant was that of the United States or the Dominican Republic.<sup>29</sup>

### III. THE DOMINANT AND EFFECTIVE NATIONALITY OF MICHAEL BALLANTINE AND LISA BALLANTINE.

15. Dominant and effective nationality must be assessed as to each Claimant, applying the customary international law standard articulated in *Nottebohm*. The relevant dates for

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<sup>26</sup> Award, para. 527.

<sup>27</sup> See, e.g., Award, para. 597 (“[W]hile this Tribunal cannot deny the fact that *during the relevant period*, the Claimants maintained connections to the United States and this also seems natural from the fact that they were born and lived in that country for the majority of their lives, in this Tribunal’s opinion, *during the relevant period* the Dominican nationality was effective and took precedence over the American nationality. Although the Claimants maintained residential connections to the United States, their permanent residence was in the Dominican Republic, overall, most of their days from 2010 to 2014 were spent in the Dominican Republic, they changed their status to permanent residents and later to Dominican citizens.”) (emphasis added); see also Award, para. 598 (“While their personal and professional relations to the Dominican Republic may have been limited, it is difficult to deny that *during that period of time* their investment kept them economically centered in the Dominican Republic.”) (emphasis added).

<sup>28</sup> 12 September 2011 is presumed to be the date the claim arose, as that is the date the Ballantines’ expansion request was denied by the Ministry of the Environment and Natural Resources of the Dominican Republic on the basis that the slopes on the upper portion of the property exceeded the 60 percent slope permitted under Article 122 of the Environmental Law and because it was considered an environmentally fragile area, creating a natural risk. See Award, para. 126 (citing Letter from Zoila González de Gutierrez to Michael Ballantine (September 12, 2011) (C-8)).

<sup>29</sup> To the extent “effective” nationality also reflects a concept that citizenship is valid as a legal matter and there is a *bona fide* connection between the natural person and the State, the Parties agree that concept has been satisfied here. See Rejoinder on Jurisdiction and Merits, para. 44 (“Typically, the first step in the ‘dominant and effective nationality’ analysis is to identify a person’s ‘effective’ nationalities (*i.e.*, any nationalities for which there exists a *bona fide* connection between the person and the State of nationality). In the present case, however, this first step is unnecessary, as it is uncontested that the Ballantines — who are nationals of both the Dominican Republic and the United States — have genuine connections to both States.” (internal citations omitted)).

determining dominant and effective nationality are 12 September 2011 (the date of the alleged breach) and 11 September 2014 (the date of submission of the claim). For the reasons explained below, both Ms. Ballantine and Mr. Ballantine had dominant and effective U.S. nationality on both critical dates.

16. Lisa Ballantine's connections to both the United States and the Dominican Republic can be summarized as follows:

- Ms. Ballantine was born and lived in the United States until 2000,<sup>30</sup> that is, for approximately the first forty years of her life. The center of her interests during this period, including her family ties and participation in public life through civic and religious groups, was the United States. The center of her professional life was also in the United States. At all relevant times, Ms. Ballantine was a U.S. citizen.
- Ms. Ballantine worked as a missionary in the Dominican Republic for a year in 2000, and returned to the United States in 2001.<sup>31</sup>
- She then moved to the Dominican Republic in August 2006, along with her husband and children.<sup>32</sup> The Ballantines enrolled their children in the American School in the Dominican Republic, attended an American church,<sup>33</sup> and spoke English at both church and at home.<sup>34</sup> Ms. Ballantine lived in the Dominican Republic from 2006 until this claim was submitted.<sup>35</sup>
- Ms. Ballantine sold much of her property in the United States when she moved to the Dominican Republic,<sup>36</sup> but maintained property in the United States throughout her time living in the Dominican Republic<sup>37</sup> and also filed income tax returns in the United States.<sup>38</sup>

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<sup>30</sup> Award, para. 179.

<sup>31</sup> Award, para. 179 (citing Amended Statement of Claim, para. 18; Jamaca de Dios Website, "History" Page (last accessed January 24, 2017) (R-11)).

<sup>32</sup> Award, para. 179 (citing Greg Wittstock, *A Man and His Mountain, A Woman and Her Heart* (February 27, 2013) (R-12); Notice of Intent, paras. 7, 12).

<sup>33</sup> Award, para. 182 (citing First Witness Statement of Michael Ballantine, paras. 89-90.).

<sup>34</sup> Award., para. 568.

<sup>35</sup> Award, para. 562.

<sup>36</sup> Award, para. 563 (citing First Witness Statement of Lisa Ballantine, paras. 1-3).

<sup>37</sup> Award, paras. 564, 207 (citing Second Witness Statement of Michael Ballantine, para. 8).

<sup>38</sup> Award, para. 210 (citing Second Witness Statement of Michael Ballantine, para. 11; Letter from Catalano, Caboor & Co, C-80).

- Ms. Ballantine purchased significant property in the Dominican Republic from 2003 to 2011,<sup>39</sup> and much of the property was purchased while she was solely a U.S. national.
- Ms. Ballantine became a legal permanent resident of the Dominican Republic in 2006, which status was renewed in 2008.<sup>40</sup>
- Ms. Ballantine became a naturalized Dominican citizen in 2010, her application for citizenship having been approved on 30 December 2009.<sup>41</sup> She maintained her U.S. citizenship as well.
- Ms. Ballantine also naturalized two of her four children in 2010.<sup>42</sup> Those two children would later return to the United States for college.<sup>43</sup>
- Ms. Ballantine voted in the 2008 U.S. presidential election, the 2012 Dominican election, and the 2014 midterm U.S. elections, while residing in the Dominican Republic.<sup>44</sup>
- Ms. Ballantine became a Dominican citizen because she had a significant investment there and she thought her Dominican citizenship might result in better treatment for her investment, and also for estate planning purposes.<sup>45</sup>
- In 2010 and 2011, Ms. Ballantine spent more days on an annual basis in the United States than in the Dominican Republic.<sup>46</sup>
- In 2012, 2013, and 2014, Ms. Ballantine spend more days on an annual basis in the Dominican Republic than in the United States, although still traveled frequently (approximately 110 days/year) to the United States.<sup>47</sup>

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<sup>39</sup> Award, para. 58.

<sup>40</sup> Award, para. 563, n. 1079; Certificates of Permanent Residency of Michael and Lisa Ballantine (R-25).

<sup>41</sup> Award, para. 566, n. 1082 (noting that “[t]he Claimants have indicated that they obtained the Dominican nationality in 2010. According to Exhibit R-018, such nationality was approved by Presidential Decree No. 931-09 issued on December 30, 2009”).

<sup>42</sup> Award, para. 578 (citing Josiah and Tobi Ballantine’s Naturalization File (R-036)).

<sup>43</sup> Award, para. 182.

<sup>44</sup> Award, para. 216 (citing to Second Witness Statement of Michael Ballantine, para. 26; Hearing Transcript, Day 1, 63:6-8).

<sup>45</sup> Award, para. 581 (citing First Witness Statement of Michael Ballantine, para. 88.).

<sup>46</sup> Award, para. 565 (citing Supplemental Witness Statement of Michael Ballantine, para. 21).

<sup>47</sup> Award, para. 565, n. 1081 (citing Supplemental Witness Statement of Michael Ballantine, para. 21.)

- Ms. Ballantine traveled to the United States approximately 30 times between 2010 and 2014.<sup>48</sup>
- During the 2010 to 2014 period, Ms. Ballantine continued to work with her U.S. nonprofit organization, Filter Pure, Inc.,<sup>49</sup> which partners with local NGOs around the world, including in the Dominican Republic, to develop water programs. Filter Pure, Inc. had significant operations in the Dominican Republic.<sup>50</sup> Since 99 percent of its donations came from U.S. donors, Ms. Ballantine, who was responsible for fundraising, spent much of her time in the United States.<sup>51</sup>
- Ms. Ballantine described her cultural connection to the Dominican Republic as “limited,”<sup>52</sup> although she also spoke of the Dominican Republic on social media as “our country.”<sup>53</sup> I agree with the Majority view that she had personal attachments both to the United States and the Dominican Republic.<sup>54</sup> Connections to the United States were not displaced with connections to the Dominican Republic.

17. There is no question that the focal point of Ms. Ballantine’s daily life shifted from the United States to the Dominican Republic when she moved with her husband and young children to the Dominican Republic in 2006. That said, this shift in focus, even coupled with Ms. Ballantine’s naturalization in 2010, is not enough to support a finding that Ms. Ballantine’s dominant and effective nationality on the critical dates (*i.e.*, 12 September 2011 and 11 September 2014) was Dominican.
18. Looking holistically at Ms. Ballantine’s habitual residence during her lifetime, the centre of her personal and professional interests, her family life, and her maintenance of significant ties to the United States, the facts support a finding that under customary international law Ms. Ballantine’s dominant and effective nationality is that of the United States. Ms. Ballantine chose to nationalize in the Dominican Republic because she and her husband owned a significant investment and thought it might bolster the success of their business. Less than two years later, the alleged breach in this case arose. That Ms. Ballantine chose Dominican nationality not necessarily for love of country and allegiance, but out of economic self-interest,

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<sup>48</sup> See Suppl. Witness Statement of Michael Ballantine, para. 10.

<sup>49</sup> See Reply Witness Statement of Lisa Ballantine, paras. 4-5.

<sup>50</sup> Award, para 183.

<sup>51</sup> Reply Witness Statement of Lisa Ballantine, para. 5.

<sup>52</sup> Award, para. 571 (citing Second Witness Statement of Lisa Ballantine, para 7).

<sup>53</sup> Award, para. 571 (citing Transcript of “Nuria” Report (June 29, 2013) (C-25)).

<sup>54</sup> Award, para. 573.

does not lead to a conclusion that her dominant and effective nationality was Dominican on the critical dates. Ms. Ballantine's economic ties to the Dominican Republic and her narrow reasons for seeking Dominican citizenship are but two of many relevant factors to be considered in this analysis.

19. Michael Ballantine's connections to both the United States and the Dominican Republic can be summarized as follows:

- Mr. Ballantine was born and lived in the United States until 2000,<sup>55</sup> that is, for approximately the first forty years of his life. The center of his interests during this period, including his family ties, participation in public life through civic and religious groups, was in the United States. At all relevant times, Mr. Ballantine was a U.S. citizen.
- Mr. Ballantine worked as a missionary in the Dominican Republic for a year in 2000, and returned to the United States in 2001.<sup>56</sup>
- He then moved to the Dominican Republic five years later, in 2006, along with his wife and children.<sup>57</sup> The Ballantines enrolled their children in the American School in the Dominican Republic.<sup>58</sup> They attended an American church,<sup>59</sup> and spoke English both at church and at home.<sup>60</sup> Mr. Ballantine lived in the Dominican Republic from 2006 until this claim was submitted.<sup>61</sup>
- Mr. Ballantine sold much of his property in the United States when he moved to the Dominican Republic,<sup>62</sup> but maintained property in the United States throughout his time living in the Dominican Republic<sup>63</sup> and also filed income tax returns in the United States.<sup>64</sup>

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<sup>55</sup> Award, para. 179.

<sup>56</sup> Award, para. 179.

<sup>57</sup> Award, para. 179.

<sup>58</sup> Award, para. 568 (citing Supplemental Witness Statement of Michael Ballantine, para. 24; Second Witness Statement of Lisa Ballantine, para. 3).

<sup>59</sup> Award, para. 568.

<sup>60</sup> Award, para. 568.

<sup>61</sup> Award, para. 562.

<sup>62</sup> Award, para. 563 (citing Witness Statement of Lisa Ballantine, para. 3).

<sup>63</sup> Award, paras. 564, 207 (citing Suppl. Witness Statement of Michael Ballantine, para. 8).

<sup>64</sup> Award, para. 210 (citing Second Witness Statement of Michael Ballantine, para. 11; Letter from Catalano, Caboor & Co, C-80).

- Mr. Ballantine also purchased significant property in the Dominican Republic from 2003 to 2011,<sup>65</sup> and much of the property was purchased while he was solely a U.S. national.
- Mr. Ballantine became a legal permanent resident of the Dominican Republic in 2006, which status was renewed in 2008.<sup>66</sup>
- He became a naturalized Dominican citizen in 2010, his application for citizenship having been approved on 30 December 2009.<sup>67</sup> Mr. Ballantine maintained his U.S. citizenship as well.
- Mr. Ballantine also naturalized two of his four children in 2010.<sup>68</sup> Those two children would later return to the United States for college.<sup>69</sup>
- Mr. Ballantine voted in the 2008 U.S. presidential election, the 2012 Dominican election, and the 2014 midterm U.S. elections, while residing in the Dominican Republic.<sup>70</sup>
- Mr. Ballantine became a Dominican citizen because he had a significant investment there and he thought his Dominican citizenship might result in better treatment for his investment, and also for estate planning purposes.<sup>71</sup>
- From 2010 to 2014, Mr. Ballantine spent more days on an annual basis in the Dominican Republic than in the United States, although he still traveled frequently to the United States.<sup>72</sup> Mr. Ballantine traveled to the United States approximately 30 times between 2010 and 2014.<sup>73</sup>
- Mr. Ballantine's business, Jamaca de Dios, was based in the Dominican Republic, and that was the focus of his professional life.<sup>74</sup>

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<sup>65</sup> Award, para. 58.

<sup>66</sup> Award, para. 563, n. 1079; Certificates of Permanent Residency of Michael and Lisa Ballantine (R-25).

<sup>67</sup> Award, para. 566, n. 1082 (noting that “[t]he Claimants have indicated that they obtained the Dominican nationality in 2010. According to Exhibit R-018, such nationality was approved by Presidential Decree No. 931-09 issued on December 30, 2009”).

<sup>68</sup> Award, para. 578 (citing Josiah and Tobi Ballantine's Naturalization File (R-036)).

<sup>69</sup> Award, para. 182; Amended Statement of Claim, para. 41.

<sup>70</sup> Award, para. 216 (citing Second Witness Statement of Michael Ballantine, para. 26; Hearing Transcript, Day 1, 63:6-8).

<sup>71</sup> Award, para. 581.

<sup>72</sup> Award, para. 565.

<sup>73</sup> Suppl. Witness Statement of Michael Ballantine, para. 10.

<sup>74</sup> Award, para. 576.



- Mr. Ballantine testified that he did little to assimilate with Dominican culture.<sup>75</sup> He also attested to his close bond with the Dominican Republic when he sought citizenship.<sup>76</sup> I agree with the Majority view that he had personal attachments both to the United States and the Dominican Republic.<sup>77</sup> Connections to the United States were not displaced with connections to the Dominican Republic.
20. There is no question that the focal point of Mr. Ballantine's daily life shifted from the United States to the Dominican Republic when he moved with his wife and young children to the Dominican Republic in 2006. Further, even before acquiring Dominican citizenship, but certainly from 2010 to 2014, Mr. Ballantine's economic ties to the Dominican Republic were stronger than his economic ties to the United States, as he spent more time in the Dominican Republic because his business was there.
21. Nevertheless, looking holistically at Mr. Ballantine's life, and considering his habitual residence during his lifetime, his family life, the center of his personal and professional interests, and his maintenance of significant ties to the United States through both family and property, the facts support a finding that under the customary international law standard of dominant and effective nationality, Mr. Ballantine was a U.S. national on the critical dates. Mr. Ballantine chose to nationalize in the Dominican Republic because he and his wife owned a significant investment there and thought it might bolster the success of their business. Less than two years after their naturalization, the alleged breach in this case arose. That Mr. Ballantine chose Dominican nationality not necessarily for love of country and allegiance, but out of economic self-interest, does not lead to a conclusion that his dominant and effective nationality was Dominican on the critical dates. Mr. Ballantine's economic ties to the Dominican Republic and his narrow reasons for seeking Dominican citizenship are but two of many relevant factors to be considered in this analysis.
22. It is worth noting that the consequence of the Majority's determination that the Ballantines are dominantly and effectively Dominican is that the Ballantines could bring a DR-CAFTA claim against the United States, assuming that alleged harm to an investment in the United States occurred during the same relevant time frame as in the instant case. It is difficult to imagine that if the Ballantines launched this hypothetical case against the United States under DR-

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<sup>75</sup> Award, para. 571 (citing First Witness Statement of Michael Ballantine, para. 89).

<sup>76</sup> Award, para. 578 (citing Letter from G. Rodríguez to the President of the Dominican Republic (R-17)).

<sup>77</sup> Award, para. 573.

CAFTA, such a case could move forward based on a dominant Dominican nationality of the Claimants. The factual record simply does not support such a conclusion.

#### **IV. THE SIGNIFICANCE OF THE BALLANTINES' DECISION TO OBTAIN DOMINICAN CITIZENSHIP.**

23. The Majority is troubled by the Ballantines' motivation for seeking Dominican citizenship, which Mr. Ballantine described at the Hearing as "it was only — had to do with economics and it had to do with estate protection. I did not integrate with the culture. I was an investor."<sup>78</sup> I agree with the Majority, quoting *Nottebohm*, that "[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being."<sup>79</sup> Naturalization is a commitment and a responsibility on the part of an individual to the country he swears allegiance to.
24. But in this particular case, what should the legal consequences be of the Ballantines' motivation for seeking Dominican citizenship? If the Ballantines were motivated by a desire to protect their investment, should that prevent them from filing a claim as U.S. nationals under the DR-CAFTA? Such a question standing alone is not one of dominant and effective nationality, but one of bad faith or abuse of rights. When determining the dominant and effective nationality of Mr. and Mrs. Ballantine, the circumstances surrounding the Ballantines' naturalization in the Dominican Republic is simply a factor to be considered as part of a holistic examination of the facts.
25. With regard to bad faith or abuse of rights, both Parties agree that the Ballantines did not acquire a second nationality as a form of treaty shopping to gain access to a dispute settlement mechanism.<sup>80</sup> In fact, their Dominican nationality had the potential to defeat their ability to bring a claim. Claimants did not take steps to avail themselves of a second nationality so they could gain protections under DR-CAFTA or bring a claim they would not otherwise have been entitled to bring. They made their investments as U.S. nationals, and the steps they took to

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<sup>78</sup> Award, para. 581 (citing Hearing Transcript, Day 2, pp. 479-80).

<sup>79</sup> Award, para. 582 (citing *Nottebohm Case*, p. 24 (RLA-6)).

<sup>80</sup> See Reply Memorial, para. 33 ("There can be no question that the Ballantines did not take citizenship in the DR to obtain treaty protection."); Rejoinder on Jurisdiction and Merits, para. 44 ("it uncontested that the Ballantines — who are nationals of both the Dominican Republic and the United States — have genuine connections to both states." (internal citations omitted)).

become Dominican nationals involved a risk that they would jeopardize their ability to bring a potential future investment claim against the Dominican Republic.


26. On these facts, the Dominican Republic chose not to allege bad faith or abuse of rights in this case, and rightly so.
27. It is commonplace for a U.S. corporation to incorporate a wholly-owned subsidiary abroad in order to do business. In the typical case, the U.S. corporation would have created a Dominican corporation for the ease of doing business – for buying property, paying employees, etc. – and the U.S. company would maintain ownership over its subsidiary and manage it from afar. There is no question that the U.S. company could bring a claim on behalf of that U.S.-owned Dominican enterprise under DR-CAFTA.<sup>81</sup>
28. The difference between the Ballantines and this hypothetical U.S. corporation is that the Ballantines were small business owners, and while they created a Dominican corporation for the ease of doing business, they decided not to manage it from afar. Instead, they moved to the Dominican Republic and chose to directly manage and run their investments with personal devotion and commitment.
29. In this case, these two U.S. nationals acquired a second nationality in 2010 in an effort to help their investments thrive. Under those circumstances, the second nationality does not become the dominant one by virtue of the investment-related motivations of the Claimants. Instead, the test for dominant and effective nationality remains a holistic one that focuses on the totality of one's personal, familial, economic, and civic ties over a lifetime. Under that test, both Lisa and Michael Ballantine are U.S. nationals who qualified as U.S. investors under the DR-CAFTA at the time of the alleged breach and at the time they submitted their claims against the Dominican Republic.

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<sup>81</sup> DR-CAFTA, Article 10.16.1(b) (R-10).

**V. CONCLUSION**

30. For these reasons, I am unable to join the Award with regard to the Majority's decision on jurisdiction and must with all due respect issue this dissenting opinion with regard to the Majority's determination that this tribunal lacks jurisdiction to hear the Ballantines' claims. I join the Award as to costs. For the reasons set forth in the Award, it is appropriate in the circumstances of this case for each party to bear its own legal fees and expenses and for each party to bear half of the costs of the arbitration.



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Marney L. Cheek  
Co-arbitrator

PCA Case No. 2016-17

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC-  
CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT,  
SIGNED ON AUGUST 5, 2004 (the “DR-CAFTA”)**

- and -

**THE UNCITRAL ARBITRATION RULES (AS ADOPTED IN 2013)  
(the “UNCITRAL Rules”)**

- between -

**MICHAEL BALLANTINE AND LISA BALLANTINE**

**(the “Claimants”)**

- and -

**THE DOMINICAN REPUBLIC**

**(the “Respondent”, and together with the Claimants, the “Parties”)**

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**PARTIAL DISSENT BY PROF. VINUESA ON COSTS**

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*Tribunal:*

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)  
Ms. Marney L. Cheek  
Prof. Raúl Emilio Vinuesa

*Secretary to the Tribunal:*

Mr. Julian Bordaçahar

*Registry:*

**Permanent Court of Arbitration**

**3 September, 2019**

## PARTIAL DISSENT AS TO THE ALLOCATION OF COSTS

1. While fully agreeing with the decision on the Tribunal's lack of jurisdiction in this matter, I regret being unable to share the grounds justifying the majority's decision on the allocation of the costs of the proceedings before the PCA, and of the Tribunal's fees and expenses, for the following reasons.
2. The applicable law for determining who should bear the legal costs and fees is set forth in DR-CAFTA as well as in the applicable arbitration rules, *i.e.* the UNCITRAL Rules.
3. Under these provisions established by different instruments, the Tribunal must, given that there is no order of priority between them, interpret and apply these provisions privileging their compatibility.
4. The guiding criterion, both in DR-CAFTA<sup>1</sup> and in the UNCITRAL Rules,<sup>2</sup> is related to the principle of "the unsuccessful party pays". The applicable law grants the Tribunal broad discretionary power to adjust the application of this principle by considering the particular circumstances of the case to reach a reasonable result. Therefore, this broad discretionary power is not absolute, but rather it must be exercised pursuant to the parameters established under the applicable law.
5. After stating that the tribunal may, if warranted, grant the unsuccessful party court costs and fees, DR-CAFTA Article 10.20.6 goes on to say the tribunal should likewise consider whether the Claimant's claim is frivolous in nature. If the tribunal finds the claim is not frivolous, it should then assess the circumstances of the case in order to adopt a reasonable criterion as regards the apportioning of the costs. DR-CAFTA Article 10.20.6 does not exclude the tribunal's power to justify the reasonability of its decision based on the particular circumstances of the case, under Article 42 of the UNCITRAL Rules.
6. Under applicable law it is not possible to confuse the frivolity assessment of a "claim" with the necessary consideration of the particular circumstances of each case to arrive at a reasonable result. The threshold for determining the frivolity of a claim is high and such a determination under no circumstances presupposes in itself setting aside the guiding principle for cost allocation

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<sup>1</sup> DR-CAFTA, Article 10.20.6 ("When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.")

<sup>2</sup> UNCITRAL Rules, Article 42(1) ("The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case").

(i.e. “the unsuccessful party pays”). Pursuant to applicable law, the “unsuccessful party pays” principle is the starting point and likewise an essential circumstance the Tribunal is required to keep in mind when deciding on the reasonability of the result in apportioning costs.

7. Thus, the Tribunal’s determination as to the frivolity or not of a claim is a determination which is prior to and independent of the consideration of the particular circumstances of the case in establishing a reasonable result.
8. For this reason, therefore, I do not agree with the conclusion of the majority of the Tribunal, which, having considered the facts of the dispute and allegations does not find elements to deem the claim “frivolous”.<sup>3</sup> Firstly, pursuant to the text and context of the applicable regulations, the frivolity of a claim does not depend on “the facts or arguments put forward by the parties”, but simply on the content and scope of the claim. Secondly, the cases cited in this same paragraph by the majority that reached the decision on costs (the *Commerce Group*<sup>4</sup> and *Corona Materials*<sup>5</sup> cases), are insufficient, under the law the Tribunal is required to apply in this case (i.e. DR-CAFTA and UNCITRAL Rules) to justify their aforementioned conclusion. Thirdly, once a tribunal has decided that a claim is not frivolous, only then must it proceed to determine the apportioning of the costs bearing in mind the guiding criterion that “the unsuccessful party pays” and any other particular circumstances of the case, to reach a reasonable result.
9. The tribunal in the *Commerce Group* case held, without providing any grounds, that the power granted to the Tribunal under Article 10.20.6 of DR-CAFTA is limited to the determination of costs, considering only whether the claims filed by the claimants or the preliminary objection submitted by the respondent were “frivolous”.<sup>6</sup>
10. Likewise, the tribunal in *Corona Materials* held that the tribunal’s discretion in allocating costs and fees is subject only to a single test – that of “frivolity”.<sup>7</sup>

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<sup>3</sup> Award, ¶ 632.

<sup>4</sup> *Commerce Group Corp. and San Sebastian Gold Mines, Inv. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011.

<sup>5</sup> *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 de mayo de 2016.

<sup>6</sup> *Commerce Group*, ¶ 137 (“The Tribunal has found entirely in favor of Respondent. However, to conclude from Respondent’s victory that Claimant’s claims were “frivolous” would be to go too far. Indeed, the Tribunal has been presented with no indication that Claimants were not serious about the claims they asserted in these proceedings”).

<sup>7</sup> *Corona Materials*, ¶ 277 (“Looking at DR-CAFTA Article 10.20.6, the immediate test for the Arbitral Tribunal is to determine whether the claim was ‘frivolous’. The Arbitral Tribunal finds that the facts surrounding the dispute and the allegations made demonstrate that the Claimant – even if it was wrong in the construction and application of the DR-CAFTA to said facts – had a bona fide claim and did not act with such wanton disregard of the facts and the law as to permit this tribunal to consider that its claim was ‘frivolous’.”).



11. Therefore, citing the *Commerce Group* and *Corona Materials* cases as valid precedents to justify the decision of the majority on costs is inappropriate. The tribunals that heard those cases were not bound, as is this Tribunal, to apply the UNCITRAL Arbitration Rules.
12. Although ICSID Rules, like UNCITRAL Rules, grant tribunals a broad margin of discretion in deciding on cost allocation between the parties,<sup>8</sup> the substantive difference lies in that the UNCITRAL Rules applicable to this case expressly states the criterion (“the unsuccessful party pays”) from which other particular circumstances of the case should be considered to reach a reasonable result on cost allocation.
13. Moreover, the above-mentioned cases cited by the majority as grounds for their decision on costs contradict the arguments made by other DR-CAFTA precedents, likewise cited by the majority: this is the case of the *Railroad Development Corporation v. Republic of Guatemala*; *Pac Rim Cayman LLC v. Republic of El Salvador*; and *David R. Aven et al v. Republic of Costa Rica* precedents.<sup>9</sup>
14. In this context, the tribunal in *Railroad*<sup>10</sup> does not take the “frivolity” of the unsuccessful party’s allegations as a basis when deciding that the costs involved in the proceedings relating to the jurisdictional stage should be paid for by the respondent who was, ultimately, the unsuccessful party in that stage. Instead, in the allocation of procedural costs related to the merits, the tribunal decided that such costs should be apportioned equally between the respondent and the claimant.<sup>11</sup> The tribunal clearly distinguishes the provisions it must apply when allocating the costs and expenses of the proceedings, acknowledging that the ICSID Rules do not impose any condition or requirement to decide on this matter. The tribunal likewise applied Article 10.20.6 of DR-CAFTA on the understanding that it had full discretion to decide on the costs and other tribunal’s

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<sup>8</sup> ICSID Arbitration Rule 28.

<sup>9</sup> Award ¶ 624.

<sup>10</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012.

<sup>11</sup> *Railroad*, ¶ 282 (“Each party has pleaded that it be awarded counsel fees and expenses as well as the administrative expenses of ICSID and the fees and expenses of the Tribunal. CAFTA Article 10.26.1 permits the award of costs and attorney’s fees in accordance with that section and the applicable arbitration rules. The ICSID Arbitration Rules only require that the award contain “any decision of the Tribunal regarding the cost of the proceeding” (Rule 47). On the basis of the discretion bestowed on the Tribunal by CAFTA and the applicable arbitration rules, the Tribunal determines that they shall be responsible for their own counsel fees and expenses. As to administrative expenses of ICSID and the fees and expenses of the Tribunal, the Tribunal distinguishes between the jurisdictional phases and the merits phase of the proceedings. Given that Respondent’s objections to jurisdiction were twice rejected in an unusually protracted process, Respondent shall be responsible for the administrative expenses of ICSID and fees and expenses of the Tribunal related to the two jurisdictional phases. Each party shall be responsible for 50% of the administrative expenses of ICSID and 50% of the fees and expenses of the Tribunal related to the merits phase..”).

expenses.<sup>12</sup> However, the tribunal, though not required to apply the UNCITRAL Rules, decided the allocation of the costs related to the jurisdictional stage by relying on the “the unsuccessful party pays” principle.

15. Therefore, the award given in *Railroad* does not help to provide support to justify the majority of the Tribunal’s decision on costs.
16. In *Pac Rim*,<sup>13</sup> the tribunal confirms, with some tempering, the principle that states that the unsuccessful party shall pay. This precedent, therefore, likewise fails to support the decision of the majority of the Tribunal on costs. The tribunal held that it had jurisdiction, dismissing the respondent’s additional objections and dismissing on the merits all the damages and interest claims submitted by the claimant during the third stage of the arbitration. The tribunal orders the claimant to pay USD 8 million for the respondent’s fees, while the costs of the procedure were to be apportioned equally between the parties.<sup>14</sup>
17. To arrive at this conclusion, the tribunal held it had broad discretion to allocate costs under Article 61(2) of the ICSID Convention and Rule 47(1)(j) of the ICSID Arbitration Rules. Thus, the tribunal considered that the following factors were relevant when exercising its discretion:<sup>15</sup>

**[t]he Tribunal has decided that the Respondent is to be considered the prevailing party in the merits phase of this arbitration. Second, [...] the Tribunal decided in its Decisión on Jurisdiction that neither Party could be considered as having prevailed overall. Third, [...] whilst the Claimant’s case prevailed over the Respondent’s case under the Tribunal’s Decision on Preliminary Objections, it was perhaps, as the Duke of Wellington might have put it (as he did of the Battle of Waterloo), a “near-run thing” with consequences for this third phase on the merits. Lastly, the Claimant’s case prevailed over the Respondent’s case on the latter’s Additional Jurisdictional Objections”.**<sup>16</sup> (Emphasis my own)

18. It is evident from analyzing the *Pac Rim* case that the tribunal did not diverge from the general principle of “the unsuccessful party pays”<sup>17</sup> but rather adapted its application to the favorable or adverse result of each party in each stage of the process. Therefore, and independently of the fact

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<sup>12</sup> *Railroad*, ¶ 283 (“XII. Decision: [...] 5. That the Respondent shall be responsible for the administrative expenses of ICSID and fees and expenses of the Tribunal related to the two jurisdictional phases [...] 6. That each party shall be responsible for 50% of the remainder of administrative expenses of ICSID and of the fees and expenses of the Tribunal. 7. That each party shall be responsible for its own counsel fees and expenses.”).

<sup>13</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, October 14, 2016.

<sup>14</sup> *Pac Rim*, ¶ 12.1.

<sup>15</sup> *Pac Rim*, ¶ 11.17.

<sup>16</sup> *Pac Rim*, ¶ 11.17.

<sup>17</sup> The tribunal dismissed the claimant’s head of claim for legal costs against the respondent and ordered the claimant to pay the respondent a proportion of its legal costs for a sum of USD 8 million (*Pac Rim*, ¶ 11.18). As regards the tribunal’s arbitration costs, the tribunal decided to dismiss each party’s heads of claim in connection with the arbitration costs *inter se* and ordered that each party should pay its respective proportion of the arbitration costs (*Pac Rim*, ¶ 11.19).

that the tribunal was not bound by the UNCITRAL Rules, this precedent also does not help to support the decision of the majority on costs.

19. In the *David Aven*<sup>18</sup> case, the tribunal held that Article 10.26.1 of DR-CAFTA provides that a tribunal may also allocate costs and attorney fees under this Section and the applicable arbitration rules. By considering that the applicable rules were precisely the UNCITRAL Rules, the tribunal pointed out that their Article 42 defines the standards for allocating costs based on the principle that arbitration costs should be paid by the unsuccessful party. This same standard authorizes the tribunal to apportion the costs between the parties, if it decides that the apportionment is reasonable taking into account the circumstances of the case.<sup>19</sup>
20. This way, the tribunal in *David Aven* does not even consider the option of restricting its discretion to merely assessing the eventual “frivolity” of the unsuccessful party when deciding on the allocation of costs and fees.<sup>20</sup>
21. The tribunal understood that it had the obligation to assess the circumstances of the case and the reasonability of costs (UNCITRAL Rules Article 42(1)) to conclude that,

[i]n this case, the Claimants are unsuccessful regarding the merits, **but the Respondent is unsuccessful on the Counterclaim so the Tribunal shall take into account such “circumstances of the case” in order to decide on the apportionment of costs.**<sup>21</sup>

(Emphasis is my own)

22. The tribunal in *David Aven* correctly interprets and applies DR-CAFTA and the UNCITRAL Rules when stating that the tribunal should consider as “circumstances of the case” – who was unsuccessful and who was successful at each stage of the proceedings – for the purpose of exercising its discretion in the apportioning of costs, pursuant to applicable law.
23. In short, the tribunal in *David Aven* did not even consider the potential or apparent “frivolity” of the claimant’s claim or of the respondent’s objections when deciding on the allocation of costs and fees. Although the tribunal decided that it did have jurisdiction, and thus the claimant is the prevailing party in that stage, the fact that on the merits the tribunal dismissed the claimant’s

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<sup>18</sup> *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, September 18, 2018.

<sup>19</sup> *David R. Aven*, ¶ 752.

<sup>20</sup> *David R. Aven*, ¶ 756 (“[t]he principle “loser pays” may be inferred from the rule of customary international law requiring “full compensation” [...]. [T]he winning party suffered damages when having to finance its defense that proved to be useless and unnecessary and that would have been avoided if the defeated party had recognized the prevailing rights of the other to avoid litigation.”), s. XIV (“(1) The Tribunal has jurisdiction over certain Claimants’ claims, as identified, and over Respondent’s counterclaim; (2) Denies Claimants’ claims under Article 10.5 DR-CAFTA and Annex 10-B; (3) Denies Claimants’ claims under Article 10.7 DR-CAFTA and Annex 10-C; (4) Denies Respondent’s counterclaim under Article 10 DR-CAFTA; (5) Orders Claimants to pay Respondent USD 1,090,905.10 for Respondent’s portion of the advances paid by Respondent to ICSID on account of arbitrators’ fees and expenses, ICSID administrative expenses, as well as direct expenses of the arbitration”).

<sup>21</sup> *David R. Aven*, ¶ 760.

heads of claim and the respondent's counterclaims, it eventually ordered that all the costs of the proceedings (*i.e.* arbitrator fees and expenses involved in the proceedings before ICSID) be paid for by the claimant, in other words, the unsuccessful party on the merits.

24. The *David Aven* precedent is also not helpful to support the decision taken by the majority of this Tribunal on costs and fees.
25. Accordingly, based on everything stated so far, I disagree with the majority's holding that, in all the precedents cited, the tribunals took into account the circumstances of the case instead of directly applying the "costs follow the events" principle.<sup>22</sup> A simple analysis of the cases previously cited, including the case in which the tribunal applied DR-CAFTA and the UNCITRAL Rules, confirms the opposite.
26. Unlike what the majority holds,<sup>23</sup> and as has already been set forth previously, I consider that "the frivolity of the claim" must be determined pursuant to its content and scope. Once it has been defined that the claim is not frivolous, the particular circumstances of each case should be taken into account to give support to a reasonable result in the allocation of costs.
27. Among the particular circumstances of this case, the majority deciding on costs cannot ignore, for the purpose of allocating such costs, that the Respondent was successful and the Claimants were unsuccessful, and therefore the Tribunal was unable to hear the merits of the claims. The very precedents cited by the majority that decided the issue of costs show that, even in some of those cases in which the UNCITRAL Rules were not a part of the applicable law, the characterization of successful party and unsuccessful party was considered as one of the particular circumstances and the starting point to keep in mind for the purpose of reaching a reasonable result in the allocation of costs.
28. Regarding the scope which the majority assigns to the nature of the objection on the dominant and effective nationality of the Claimants as though this were a relevant circumstance to bear in mind, I consider that, while this objection sets forth a novel issue, it in no way warrants considering this case as a complex one to justify the existence of a special circumstance that would merit setting aside the application of the guiding principle on costs allocation.<sup>24</sup> Unlike what the majority deciding on costs held,<sup>25</sup> I consider that the power to interpret the applicable

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<sup>22</sup> Award, ¶ 624 *in fine*.

<sup>23</sup> Award, ¶ 362.

<sup>24</sup> Although in the context of this particular case at issue, the tribunal in *David Aven* held that "[t]he Tribunal thinks that the issues that were submitted to its judgment, although showing some technical complexity, by themselves are not especially complex from a legal point of view. The complexity of this case arises rather from the actions and omissions of the parties than from the litigated issues." (*David R. Aven*, ¶ 762).

<sup>25</sup> Award, ¶ 629.

rules is not an exceptional role justifying the existence of a special circumstance. Rather, this power is part of the basic primary role any tribunal is required to assume when reaching a decision consistent with the law.

29. Furthermore, within the particular circumstances of this case, one cannot overlook the effects of the Claimants' opposition to the request for bifurcation made by the Respondent. This opposition led to a majority decision by the Tribunal on bifurcation which demanded considerable time and effort and greater costs to the Parties throughout the procedure. These greater costs turned out to be unnecessary and fruitless since the Tribunal eventually reached a majority decision on its lack of jurisdiction.
30. Moreover, I consider that when the majority deciding on costs holds that "*the Claimants brought a credible case,*"<sup>26</sup> a value judgement is being made on the merits that exceeds the scope of the majority's decision as to the Tribunal's lack of jurisdiction.
31. In the present case, the lack of jurisdiction makes no pre-judgement as to the merits of the issues brought, therefore, the Tribunal cannot and should not give an opinion on the merits. In this sense, the Tribunal, having decided by majority that it has no jurisdiction, is not empowered to give an opinion as to the consequences that the majority deciding on costs attempts to attribute to the allegations by the Claimants on the merits, by describing them as consisting of a "credible case". In this context, it is certainly understandable that the Tribunal should have an opinion to be able to determine whether the claim is frivolous or not. But that opinion must inexorably be based on the content and scope of the Claimants "claim" in the context of the jurisdictional stage, and not, as held by the majority, on "the facts and allegations of the Parties"<sup>27</sup> as developed throughout the proceedings. In this award, the analysis of the majority decision on jurisdiction make no reference to the developments on the merits for the simple reason that such proceedings could not be taken into account as grounds for a decision on jurisdiction.
32. Likewise, I consider that not only the Claimants, but also the Respondent, acted in good faith and submitted their arguments on jurisdiction adequately and acted professionally during the proceedings. Therefore, it is my understanding that it is not possible to consider the behavior of one of the Parties as a special circumstance to benefit that Party as regards the other, which, as the successful Party, also displayed the same behavior.
33. Finally, the majority that decided on costs failed to verify the reasonability of the result caused by its decision. It does not even base its reasoning on the cases it cites to provide a counterfactual test comparing the logical consequences of a possible decision in favor of the Claimants on

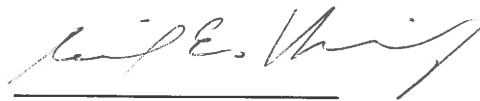
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<sup>26</sup> Award, ¶ 633.

<sup>27</sup> Award, ¶ 632.

jurisdiction and in favor of the Respondent on substance, with the decision on jurisdiction in favor of the Respondent adopted by the majority.

34. To conclude, a submission based on a claim that can be defined as “not frivolous” may, to my understanding, empower the Tribunal to mitigate the rigorosity of the guiding principle it is required to apply (“the unsuccessful party pays”), but not to ignore it, and much less to dismiss it. In this context, taking into account the behavior of the Parties and their legal counsel during the process, I consider that each of the Parties should bear their own costs and fees. Since, in accordance with the particular circumstances of the case, the Claimants have been unsuccessful in all of their jurisdictional claims, there has been no especial legal complexity involved in the issues submitted, and in view of the costs incurred as a consequence of the Claimants’ opposition to the request for bifurcation made by the Respondent, it is reasonable to decide that the expenses of the PCA and arbitrator fees and expenses should be borne entirely by the unsuccessful Party, *i.e.* the Claimants.
35. For all the reasons set forth above, and agreeing that each Party should bear its own costs and legal fees incurred throughout the proceedings, I dissent with the majority that decided on costs, with regards to their decision to allocate the costs of the PCA proceedings and the Tribunal’s fees and expenses equally among the Parties. I therefore consider that PCA’s costs, including the Tribunal’s fees and expenses, should be borne entirely by the Claimants after due consideration of the particular circumstances of the case that justify the reasonability of the abovementioned apportionment.

A handwritten signature in black ink, appearing to read "Raúl E. Vinuesa", written over a horizontal line.

Prof. Raúl Emilio Vinuesa  
Co-arbitrator